

TORTIOUS LIABILITY OF PARTIES TO CONSTRUCTION CONTRACTS

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Dedication

The work is dedicated to all the people of the Sudan who work conscientiously to construct ever-lasting civilization and peace for the Nation

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Abstract

This is a comparative study, which sheds light on an important, and yet less explored topic of torts in construction law in the Sudan. Chapter one dealt with the nature of construction industry and construction contracts. The parties to construction contracts were identified and their various roles were explained. The special nature and classification of construction contracts were pointed out together with examples of prominent standard forms.

Chapter two discussed the most important torts in construction. The discussion elaborated on judicial precedents and statutory rules, which illustrate the approach to torts from the perspective of construction. Issues related to causation, damages and proof of loss were, also, discussed.

Chapter three discussed joint and vicarious liability in addition to employer's strict liability for injury to employees in construction projects. The discussion, also, covered the important issue of liability of the project owner for acts of independent contractors.

Chapter four summed up the findings and recommendations for reform of Sudanese law in the field of tortious liability of parties to construction contracts.

الخلاصة

تهدف هذه الرسالة إلى إلقاء الضوء علي موضوع المسؤولية التقصيرية في القانون السوداني وهو موضوع تقل البحوث فيه علي الرغم من أهميته.

ناقش الفصل الأول طبيعة صناعة وعقود التشييد وعرف كذلك أطراف تلك العقود وشرح أدوارهم المختلفة. أشار الفصل أيضا إلى التصنيف والطبيعة الخاصة لعقود التشييد كما أورد أمثلة للنماذج المشهورة التي تستخدم في تلك العقود.

ناقش الفصل الثاني المسؤولية التقصيرية في التشييد وقد أسهبت المناقشة في تناول السوابق القضائية والقواعد التشريعية التي توضح كيفية تناول المواضيع المتعلقة بالمسؤولية التقصيرية من منظور التشييد. كما تم تناول المواضيع المتعلقة بالسببية والتعويض وإثبات الضرر. ناقش الفصل الثالث المسؤولية المشتركة والمسؤولية عن أفعال الغير بالإضافة للمسؤولية المطلقة لمالك المشروع عن الأذى الذي يلحق بالعاملين. غطت المناقشة كذلك مسؤولية المالك عن أفعال المقاولين المستقلين حيث أنها من المواضيع ذات الأهمية الكبيرة في مجال التشييد. لخص الفصل الرابع الحثثيات والتوصيات لإصلاح القانون السوداني في مجال المسؤولية التقصيرية لأطراف عقود التشييد.

Preface

There has been increasing investment related to construction in recent years and there is great hope that the coming few years will witness even more development in construction projects in the Sudan. Thus, the study and reform of Sudanese law to cope with the new developments in this business have become a great necessity.

Tortious liability, in particular, is a sensitive issue which needs special attention during the performance of construction contracts.

The reason for comparison between Sudanese law and Anglo-Saxon laws is that the latter are developed in the area of construction and hence they can be a good example for comparison and emulation for Sudanese law.

The existing statutory and judicial precedents on tort, in the Sudan, need to be carefully reconciled with the universal needs of construction. Study and comparison with international legal approach to construction issues is, also, important in this age of globalization of industries and legal rules.

It is appropriate, in this context to quote from an article published for Professor David L. Perrott in the Sudan Law Journal and Reports in 1961 where he stated that:

(Sudanese courts have indeed gone even further, and where there is no express Sudanese provision on a topic, have taken over relevant English statutes in their entirety, and applied them as common law of the Sudan.)

Abbreviations

AC	Appeal Court
SLJR	Sudan law Journal and Reports
N.Z.L.R	New Zealand Law Reports (New Zealand).
WWR	Western weekly reports
N.E	North eastern reporter (USA)
Cal. App.	California Appellate Reports (USA)
I.C.L.R	Incorporated Council For Law Reporting For England And Wales
N S W R	New South Wales Reports
QB	Queen Bench
W.L.R	Weekly Law Review
All E.R	All England law Reports
LRCCR	Law Reports : Crown Cases Reserved
C.L.R	Commonwealth law reports (Australia)
BLR	Building Law Reports
TLR	Trading Law Reports
N.I	Northern Ireland Law Reports
S C R	Supreme Court Reports (Canada)
K.B	King Bench
Constr. LJ	Construction Law Journal
FIDIC	International Federation Of Engineers And Consultants
HGCR	Housing Grants, Construction and Regeneration Act 1996 (UK)
CTA	Civil Transactions Act 1984 (Sudan).

Chapter 1

Nature of construction

Industry & construction contracts

1. Introduction:

Construction industry includes a wide range of fields, prominent examples of which are civil engineering works and building structure, but, generally speaking, construction ranges from construction of power stations, factories, chemical plants, roads, bridges to shipbuilding and satellite construction.

However, the description mentioned here is by no means a limitation to the sectors of this industry, which keeps developing and expanding continuously with the development of relevant sciences and needs.

Construction projects are unique and they entail great care about the various complexities, uncertainties and risks that the parties might encounter during the execution of various projects.

In order to cater for its own requirements construction industry has worked out its own very particular forms of contracts and project management techniques which in turn have framed the whole legal approach to issues relating to construction.

The special contract forms thus created have to accommodate clauses that necessarily deal with other liabilities, which could arise as a result of the performance of contractual obligations by the parties. Matters at issue in this context are those related to tortious liability.

Many torts could arise during the performance of construction contracts such as negligence, trespass, nuisance, etc. but the nature and liability for them cannot be perceived without considering the special nature of construction contracts i.e. more specific understanding needs to be adopted for the application of the principles of the law of torts to construction cases.

Tortious liability in the course of the performance of a contract has been recognized in Sudanese law, though not for the first time, in the case of Mahdi Abdul Hamid Al Mahdi vs. Sudan Railways Corporation¹ where it was held that a party suffering from damage by reason of breach of contract is not precluded from claiming damages in tort against the party in breach if he has cause of action for such claim.

It was concluded that proof of such tortious liability would not be affected by the fact that the original relationship between the parties was a contractual one. According to the rule in the mentioned case it is recognized law in the Sudan that any party is under implied obligation not to commit any act, which causes danger to the other party's safety or property. This rule clearly refers to legal obligations of the parties as opposed to contractual obligation, which, in fact, is the basis of tortious liability.

¹ SLJR 1978 p. 59

As far as legislation in the Sudan is concerned the Sudanese Civil Transactions Act 1984 further provides for liability of the contractor for damage caused by negligent acts in addition to any other acts that might be committed by him or her in the course of performance of the contract. Section 384 reads as follows:

“The contractor shall pay compensation for any loss or damage arising from his acts or work, whether intentional, negligent or otherwise. Compensation shall not be payable if such loss or damage is a consequence of an unavoidable event.”

2. Characteristics of Construction Industry:

For the sake of conciseness the following points can be made to indicate some of the key areas, which are common to those who deal with construction.

i) Civil Engineering:

Civil engineering involves works, which are related to infrastructure; i.e. roads, tunnels, bridges, harbours, water supply, sewers and power stations. Civil engineering projects, usually, need high capital value and take long time to complete.

ii) Building:

Building works are concerned with the construction of commercial and domestic buildings. For the building sector it is very important to give all the details of the building, its services and finishes.

iii) Other Categories:

Without limitation, an illustration of these can be construction of factories, chemical plants, shipbuilding and demolition.

iv) Parties Involved In Construction:

There are so many relationships, which are created by construction contracts. The parties involved in a construction project, usually, include the owner of the property; architects, engineers, and consultants. In most cases such contracts include banks and financial institutions, which advance money to fund the purchase of the property or the construction of the property.

Rights and duties of parties in construction contracts intersect in a circle that contains the general contractor, subcontractors, suppliers and their sales representatives e.t.c.

For the ease of reference the parties to construction projects can be grouped into the following three categories, namely; owners, consultants and contractors.

a) The Owner:

The party who promotes or commissions the construction project is generally referred to as the owner in construction contracts but in some cases the same party is called the client, the employer, the purchaser or the promoter. That is because, generally, this party is the owner of the subject matter of the construction.

The duties of the owner of the property under the contract and under the law, in general, start by performance of a variety of pre-construction tasks. An owner is obligated to obtain required licenses and permits from competent government authorities. Failure to undertake necessary inspections or tests or obtain all approvals might entail liability of the owner to parties who might be affected by such failure. It is common to see in construction contracts a reference to observance of statutory obligations breach of which, as we will discuss later, might lead to tortious liability, as well.

The owner is under a duty to warn persons who will be exposed to dangers in the site of the dangerous condition, which exist there. Thus, from the perspective of the law of torts, the owner owes a duty to persons who will either be exposed to the danger or are likely to face liability for injuries and losses arising out of the dangerous condition.

In current construction practice an owner would attempt to discharge his duty to warn and inform about site conditions by conducting what is known as a walk-through with workers and contractors. A walk-through is literally a presentation and inspection by the owner of a construction site before any work is done. The purpose of a Walk-through is to familiarize and acclimatize the workers and contractors with site conditions and to warn them of possible dangers.

b) The Consultant:

The parties who give advice on the construction project are referred to as consultants; they can be architects, engineers or surveyors. The brief or agreement defines the scope of responsibility for the consultant. The normal obligation on consultants would require them to carry out their services with reasonable skill and care.

c) The Contractor:

Contractors are the parties who take the responsibility for the physical construction of the works. Their scope of work used to be the execution of the construction works, only, but recently it expanded to the designing and building activities, as well.

The general contractor is responsible for coordinating the construction work and its completion according to the terms and conditions of the contract. In contracts, which involve large construction projects, a general contractor would hire subcontractors to perform particular tasks within the general scope of work of the main contract.

Typical subcontractors in the construction business include electricians, plumbers, excavators, carpenters, and manufacturers of building materials.

3. Characteristics Of Construction Law And Construction

Contracts:

i) Construction Contracts:

a) Definition Of Construction Contracts:

Construction contracts are treated according to the general rules of the law of contract but statutory rules could have great impact on the formation and the performance of such contracts.

In Sudanese law there is no definition of a construction contract as such. The only related provision to this subject can be found in The Civil Transaction Act 1984 Part XII, which deals with Contract of Works and Civil Engineering Contracts. Section 378 of The Civil Transactions Act 1984 defines the Contract for Works as follows:

“By a contract for works one of the contracting parties undertakes to manufacture something or to perform a service in consideration of remuneration which the other contracting party undertakes to pay.” It is clear that such definition can extend to other engineering contracts and it cannot be seen as particular to construction contracts.

The position in English law is different where specific reference is made to construction contracts in the Housing Grants, Construction and Regeneration Act 1996 (HGCR). Section 104(1) of the Act defines a "construction contract" as an agreement for:

- Carrying out construction operations;

- Arranging for the carrying out construction operations by others under a subcontract or otherwise;
- Providing one's own labour or the labour of others for the carrying out of construction operations.

It is clear from Section 104(1) that the term "construction contract" is not only confined to the meaning of an ordinary contract under the general principles of the law of contract i.e. it is not confined to the ingredients of an enforceable contract, like capacity, intention to create legal relations, consideration e.t.c. It should also be considered whether or not there may be an agreement for the purposes of Section 104 of the Act and not only for the purposes of mere formation of a contract.

Section 104(2) of the Act provides that reference to a construction contract, also, includes agreements to do architectural, design or surveying work and to provide advice on building, engineering, interior or exterior decoration or the laying out of landscaping, in relation to construction operations.

ii) Construction Law:

Identifying the boundaries of construction law is a difficult task because this branch of law is comprised of so many traditional legal topics, including contracts, torts, insurance, surety ship and property law, e.t.c.

Construction law is also derived from the agreements made by the various parties to a construction contracts as well as . Rules set out in judicial decisions or by governmental agencies also affect construction law such as the rules governing health, environment and municipal regulations.

a) Classification of Construction Contracts:

Construction contracts can be classified into three categories. The first traditional form of which is the build-only contracts. In the mentioned category the contractor is only responsible for the execution of the design. Principal types of contracts within this category can be classified in terms of payment mode as; the lump sum or fixed price contracts in which the contractor agrees to complete the whole work for a specific sum of money. But nevertheless those contracts can provide for a schedule of rates or bill of quantities that can be used to value change orders.

The second type of contracts in the traditional form are known as measure and value or re-measurement contracts. In this type of contracts the actual completed work is measured at completion and valued according to the rates, which are set out in the bill of quantities. The third type is known as Cost plus contracts or “Fixed Free Contract” where the contractor is paid the actual cost for the work. Predetermined description of cost can be used in this type together with an agreed fixed fee, often called a percentage.

The second category of construction contracts is the non-traditional form that is described as the design and build contracts, often called “package deal contracts”. In that sort of contracts the contractor performs and assumes responsibility for both the design and the construction as well.

The third non-traditional category is design, build, operate and transfer or Turn-key Contracts. The mentioned contracts, also, introduce more responsibilities for the contractor so that he becomes responsible for operation and transference of the project, as well.

b) FIDIC Contracts:

It is also common to find other more complex standard contract forms, which address different construction needs. Some of the well-known and widely used contract forms

are those known as FIDIC contracts. FIDIC is an abbreviation of the French title of the international federation of engineers and consultants, “Fédération Internationale des Ingénieurs-Conseils (FIDIC)”. FIDIC has developed model standard form contracts for use in the international construction industry. They are commonly referred to as FIDIC contracts.

In September 1998, FIDIC published four new or revised standard form contracts comprising new editions of two existing forms. The forms are the Red Book, the Yellow Book, the Silver Book and the Green Book. Each of the mentioned books deals with a particular form of construction agreement.

The Red Book (fourth edition) deals with civil engineering works and the Yellow Book (third edition) with electrical and mechanical works in both instances, the employer and/or the engineer either supplied the design or played a central role in producing it.

FIDIC prepared the Orange Book (first edition) to provide a contract where the contractor supplied the design and took single-point completion responsibility. The Orange Book, unlike the old Red and Yellow Books, contemplates the use of an employer's representative and does not use the term "Engineer".

The Silver Book is intended to deal with a turnkey contract where the contractor takes responsibility for design and the contract is on a strictly two-party basis; that is to say there is no intermediary such as the engineer.

c) Sudanese Standard Construction Contract Forms:

In 1999, a national Sudanese technical committee was established in order to draft Sudanese standard construction contract terms and conditions. The committee comprised renowned engineering bodies as well as some lawyers who are experienced in the construction field. The standard contract focused on general terms and conditions.

iii) Functions of Construction Contracts:

The function of construction contracts is to provide a mechanism to control the work and regulate it in case a variety of speculated occurrences should happen, an example of this can be the variance of designs, alteration of the construction program, extra payments and extension of time. The risks, which the parties assume, must, also, be provided for in the contract.

The most important determinant of success for any construction contract is its mechanism and policy for risk management and claims avoidance.

iv) Subcontracts:

The use of subcontractors to execute parts of the construction work is one of the most prominent features of construction industry. It is quite usual to find that the main contract is providing certain agreed conditions and warranties to be included in the subcontract.

It is also a prominent feature in construction to encounter different forms of joint ventures, whether with regard to the subcontractors or the main contractors to the project. The purposes for using joint ventures in construction can be so many but principally there are two purposes.

Firstly, they can be formed at the request of the employer for the purpose of sharing expertise and transfer of technology; examples of this are common in major construction projects owned by governments in developing countries.

Secondly, they can, also, be formed for the purposes of sharing the risk and responsibility or creating long term relationship.

v) Conclusion:

From the brief description of construction industry and the complex nature of factors leading to the execution of construction projects it can be clear that a construction contract, however comprehensive it might be, can never guard against all eventualities in the construction reality.

The bulk of manpower used in construction contracts is usually big and the physical area affected, in most cases is a large one, therefore, during the execution of construction works the effects of a particular incident or activity can extend to a big number of parties or third parties.

Construction activities involve a large degree of interaction and interrelations whether between the parties to the contracts and subcontracts or towards third parties, at large.

CHAPTER 2

The Law of Torts in Construction

1. Introduction:

This chapter deals with some of the most common torts in construction as well as damages for breach of tortious liability.

Winfield defines tortious liability as follows:²

“Tortious liability arises from a breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for un-liquidated damages.”

The definition has two main ingredients, the first one shows the difference between contract and tort i.e. a duty primarily fixed by law, which literally means that a party is under a duty in tort because the law says so and not because the party has agreed to

² Winfield & Jolowicz on Tort (11th) edition 1979, p. 3.

it. The second ingredient shows that a duty in tort is towards persons in general which, also, shows the contrast with the duty under contract, which is owed to a specific person or persons by agreement of the parties.

The scope of this definition would help to explain how the performance of a construction contract could create much wider liability for the parties than they primarily might have considered, at the time of the formation of their contract.

Torts play a very important role in construction and it is, therefore, very significant for parties to construction contracts to consider all issues related to anticipated torts. Consideration of anticipated torts is vital to the framing of the final agreement between the parties with regard to, for example, the assessment of cost, work plan, and required insurance coverage of risks, in case they wish to provide any.

With the development of legislation and legal obligations relating to construction great efforts are required to envisage all the expected scenarios that might give rise to tortious liability.

Although it is possible to see the position of Sudanese law in some cases with regard to tortious liability, in general, but it is not, always, easy to see the same in relation to construction.

2. Some Torts in Construction:

i) Negligence:

The tort of negligence is considered to be of high importance in construction due to the fact that the high standard of care and skill required in construction cannot, always, be attained. However, many other torts are, on occasion, of relative importance and the parties should be aware of them.

Winfield defines the tort of negligence as “a breach of a legal duty to take care, which results in damage undesired by the defendant to the plaintiff.”³

It has three ingredients, which are:

- Legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty.
- Breach of that duty.
- Consequential damage to B.”

The first ingredient of the tort of negligence which, is the duty of care on the part of the plaintiff towards the defendant, needs special focus, as a person might not be held responsible for any careless act if it cannot be proven that he owes a duty of care to the defendant.

The particular nature of construction raises questions as to the scope of the duty of care in negligent acts leading to physical damage in construction sites. However, for an owner or a construction contractor, it is worthwhile to have, in place, a contract policy for as much site precautions as possible to limit the range of the duty of care towards potential defendants.

The second ingredient of the tort of negligence concerns breach of duty. The circumstances of breach of duty of care are decided upon according to the reasonable man test, which was explained in a dictum made by Alderson B. in the English case *Blyth v. Birmingham Waterworks Company* as follows⁴:

"The reasonable man test in construction torts has to be qualified by the particular nature of the industry. What a reasonable man in the industry would do or would not do is what matters when it comes to applying the test."

³ Winfield and Jolowicz on Tort, (11th) Edition, p. 66

⁴ (1856) 11 Exch. 781, 784

a) Damage related to negligent act:

In construction, the property to which damage occurs could be characterized by two distinctions; firstly; it might be property, which, exists independently of the defendant or, secondly; it might be property, which has been supplied by the defendant.

In the latter case the law does not consider the damage as damage to property, which justifies an action in negligence but as an example of defective product that can be remedied by an action in contract.

The above is an English law principle that was established by the House of Lords in the case of, *Murphy v. Brentwood*⁵.

The principle laid down in the abovementioned case has become of paramount significance for construction law; for explaining dangerous defects and defects of quality; therefore, the following lengthy quotation from Lord Bridge is essential for explaining its rationale:

"If a manufacturer, negligently, puts into circulation a chattel containing a latent defect, which renders it dangerous to persons or property, the manufacturer on the well-known principles established by the *Donoghue v, Stevenson*⁶, will be liable in tort for injury to persons or damage to property, which the chattel causes. But if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who having acquired the chattel suffer economic loss because the chattel is defective in quality.

⁵ (1990) 3 WLR 414, 50 BLR 1

⁶ (1932) AC 562

If a dangerous defect in the chattel is discovered before it causes any personal injury or damage to property because the danger is now known and the chattel cannot be safely used unless the defect is repaired the defect merely becomes a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and it must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable by any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.

I believe these principles are equally applicable to buildings. If a builder erects a structure containing a latent defect, which renders it dangerous, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused the loss sustained by the building owner is purely economic.

If the defect can be repaired at economic cost that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but here again, in the absence of a special relationship of proximity they are not recoverable in tort. The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle to be, entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is

necessarily incurred in order to protect himself from potential liability to third parties.”

In the earlier case of *D&F Estates v. Church Commissioners for England*⁷, Lord Bridge explained the difference between property damage and pure economic loss by describing what was called the “Complex Structure Theory”. The mentioned theory deals with the situation where the structure comprises a number of distinct parts. It follows from such complex structure that defects in one part (like the foundation) might lead to damage to other parts (like a wall) supported by the foundation.

According to the theory, in this case, the contractor who built the foundation is liable for economic loss that can, only, be recovered from him in contract. But, as far as damage to the wall is concerned, the plaintiff can, still, recover damages from the contractor in tort because the contractor’s negligence with regard to the foundation leads to damage of other property owned by the plaintiff."

b) Failure of the architect to supervise:

This issue was dealt with in two cases, namely, *Clayton v. Woodman & Son Builders Ltd.*⁸ and *Clay v. J Crump & Son Ltd*⁹.

In the former case, the plaintiff was a workman injured in the collapse of some masonry following the visit of the architect to the site. It was alleged that the collapse happened because of the architect’s failure to vary the work. It was held that the role of the architect was to advise the client and he was entitled to assume that the contractor would execute the work safely and that he owed no duty of care to the contractor or the workers on the site. However, the architect can be held liable in negligence if (in the words of Lord Justice Pearson): “there is some evidence that the architect directed the workman to do something dangerous- that is to say something

⁷ AC (1989) p. 177

⁸ 4 BLR 65

⁹ 4 BLR 80

that the architect knew or ought to have known would be done in such a manner that would be dangerous- then it might well be that some duty would have been imposed on the architect.”

Thus, it can be said that the architect’s liability could arise in case he gives advice as to the mode of undertaking the construction or if he directs that work which is inherently dangerous.

In the case of *Clay v. J Crump*, the architect allowed a wall to be put into a dangerous condition. When the wall collapsed the architect was found jointly liable with the contractor, in negligence.

In *Demars v. Dufresne*¹⁰ the Supreme Court of Canada held a consultant engineer 50 per cent liable to a contractor for failing to detect a glaring error in the latter’s compressed air calculations which had been submitted for approval, and which resulted in an explosion and economic loss to the contractor. Very shortly after, this case was purportedly followed in Manitoba in *Trident Consuction v. Wardrop*¹¹ where Wilson J. held an engineer partly liable, together with specialist sub-contractors, to the main contractor for failure to warn the latter that his working platform might be too low and subject to flooding.

It is submitted that these two Canadian cases are not of general authority, even in Canada and that in principle a professional owes no affirmative duty of care to a contractor to safeguard him form economic loss. Only a positive unqualified intervention or representation made or given in circumstances in which the professional could be said to accept responsibility for its efficacy or accuracy, would fall within the terms of the *Hedley Byrne* principle

¹⁰ SCR 1979 p. 146

¹¹ 6 WWR 1979 p. 481

Sudanese law distinguishes between liability for defects in design on the one hand and liability for supervision of the execution on the other. An engineer who designs the works is only liable for defects in the design; he would not incur extra liability except in case of his supervision of the execution of such works.

Section 387 of the Civil Transaction Act 1984 reads as follows;

"If the engineer's work is confined to preparing the design only without the supervision of the execution of the works, he shall be liable only for the defect in the design. If the contractor carries out the works under the supervision of an engineer or the employer who acts as such, the contractor shall be liable only for improper execution but not for any defect arising from the design.

(2) Any term exempting or limiting the liability of the contractor or the engineer for compensation shall be void."

No authority on the application of this section has been found but it can be interpreted to provide for liability of the engineer in case of negligent supervision of the works. However, the need for more elaboration is great because the section in its present wording does not clearly cover all occasions of negligent supervision.

It is, also, noteworthy that the section prohibits the parties from limiting or exempting themselves from liability for compensation. Such prohibition is against what is known as liability cap, which is a common preference nowadays in construction contracts as well as other contracts.

The trend in the English and Canadian cases referred to above can be very useful if adopted to qualify the application of the section and any future reform.

c) Liability related to design professional:

Liability of design professionals was discussed in *Edgeworth Construction Ltd. v. F. Lea & Associates*¹² where a road works authority employed consulting engineers to design a length of highway and to prepare a full contract documentation, including specifications and construction drawings. The successful tenderer after completing the project sued the engineers for economic loss said to be caused by negligence in design work including the preparation of plans and specifications and their incorporation into the tender documents, on which the contractors allegedly relied. On a preliminary objection by the engineers that as a matter of law they owed no duty to the contractors, held, by the British Columbia Court of appeal, following *Pacific associates v. Baxter*¹³ that the contractual relationship in a construction project were a crucial element in determining liability. The whole question of errors in design or in plans and specifications was appropriate subject-matter for the contract between the contractors and the Ministry. By contrast the engineers had no opportunity to define with the contractors the risks they were prepared to assume. Not being in contractual relations. Nor could they control the contents of the contract between the Ministry and the contractors. The contractors had an opportunity to protect themselves in their contract with the Ministry in relation to risks they were prepared to bear. On the facts there was no sufficient proximity between the engineers and contractors to support a duty of care to avoid economic loss by successful tenderers, Held by the Supreme Court of Canada, reversing the court of Appeal, that the engineers had knowingly undertaken to provide information (the tender package) for use by a defined class (tenderers) for the purpose of preparing their prices and the plaintiffs as tenderers had reasonably relied on the information so that, *prima facie*, there was a cause of action unless their construction contract with the owners negated that duty.

¹² 3 S C R (1993) p. 206

¹³ 1 QB 1990 p. 993

Clause 42 of that contract stated that any representations in the tender documents were furnished merely for the general information of bidders and were not in anyway warranted or guaranteed on behalf of the Minister. This arguably absolved the Authority from any liability for the plans, but on its express words did not purport to protect the engineers against liability for their representation. Clause 42 was consistent with the conclusion that the protection was intended for the benefit of the province alone. The engineers could have taken measures to protect themselves by placing a disclaimer of responsibility on the design documents, alternatively they could have refused to provide design without ongoing supervision duties which would permit later alternations to the design or they could have insured against their liability, these circumstances negated any inference that the contractors had contractually excluded their right to sue for the design deficiencies. No policy reasons existed for denying the duty. The additional risks would be reflected in the price of the engineers contract. If the contractor was limited to his rights against the construction owner he would have no rights in respect of defective plans at all. An important consideration against the engineers would be that the tendering contractors would be obliged to do their own engineering and review the accuracy of the engineering design and information. Repeating the process already undertaken by the owner. This would have to be done in the short time available of two weeks. It would be more sensible for one firm to be responsible for the adequacy of the design, barring contractual disclaimers, it would be better for owners to pay more for engineering services than the indirect cost of additional engineers engaged by all tendering parties. Held also that the duty was owned only by the engineering firm and not by its individual engineers who had.¹⁴

¹⁴ Hudson's Building and Engineering Contracts, 12th edition, p. 172,.

d) Negligent statements:

Decided English and American cases show the various situations whereby negligent statements can affect the liability of the maker. The following can be referred to:

- Responsibility to obtain by-law approvals:

In *Townsend v. Cinema News*¹⁵, an architect told a builder he would be responsible for issuing the necessary notices for by-law approval. Work was done which, without approval would be in breach of the by - laws and the builder became liable to the owner for the cost of work to obtain by-law compliance. Held, by the Court of Appeal, that the architect as a professional man had acted gratuitously in offering his services and accordingly owed a duty to the builder to do so to the best of his skill notwithstanding the absence of consideration.

- Misleading Soil Specialist Report:

In *Miller v. Dames and Moore*¹⁶ soil specialists, employed by consulting engineers to a local authority, provided a report prior to tenders being invited. There were express exclusions of liability in the contract documents protecting the authority and their consultant but not the soils engineers. The specialists report misled the contractor causing him economic loss. For which he sued the specialists in tort. Held by a Californian Court of Appeal that in the absence of evidence that the defendants did not know their report was intended to provide information to tenders, they were liable in tort to the contractors.

- Inaccurate survey plat:

¹⁵ 2 BLR 1958 p. 118- see also Hudson 12th edition 65-66.

¹⁶ Cal. App. 2d 1961 p. 306

In *Rozny v. Manual*¹⁷ a surveyor prepared "plats" or setting out surveys of building plots, each containing a certificate of accuracy, for a developer, who sold on a plot to a home owner together with the survey. The house and garage that were built, then, encroached on neighbour's plot,
Held by the Supreme Court of Illinois, the surveyor was liable to the homeowner in tort.

- Clear certificate causing financial loss:

In *the Minister of Housing v. Sharp*¹⁸ the official in charge of the local Land Charges Register negligently issued a clear certificate to a prospective purchaser of land. This positively benefited the representee / purchaser, since it rendered unenforceable an earlier planning charge in favour of the government, held, the local authority was liable to the relevant government department for the financial loss.

- Non-disclosure of facts during negotiations:

In *Dillingham Construction v. Downs*¹⁹ a local authority, during negotiations for a dredging contract, did not disclose, in response to a general inquiry the existence of underground mine working beneath the sea bed of which records existed in its archives but which were unknown to the negotiating officers themselves, held by Hardie J., while the Hedley Byrne principle could exist between contracting parties, it should be applied with caution in the context of commercial negotiations leading up to a contract and in the absence of any clear misrepresentation the authority was not liable.

- Reassurance to sub-contractor of payment:

¹⁷ N.E. 2d 1969 p.656

¹⁸ 2 Q.B. 1970 p. 223

¹⁹ 2 N S W R 1972 p. 49

In *Day v. Ost*²⁰ a sub-contractor, who discontinued working because he had not been paid was reassured by the architect that there were considerable sums owing to the main contractor sufficient to meet his account, and resumed working. The architect's statement was negligent, and the contractor had received nearly all the contract sum due to him. The sub-contractor sued the architect in tort for his loss when contractor became insolvent. Held by Cooke J. there was a sufficient special relationship to render the architect liable for the sub-contractor's loss.

- Negligent Issuance of Certificate of Conformity:

In *District of survey v church*²¹ a consulting engineer, who was not a soils specialist, was employed by an architect to inspect trial pits and twice-recommended deeper investigations, having seen silty clay in the pits but was told the owner would not agree. Later under strong pressure from the architect when building inspector queried the consultant's design he wrote a letter to the inspector stating that the material in the trial pits had a substantial bearing capacity. Later still he issued a certificate that the design conformed to the National Building Code.

Held, by the British Columbia Court of Appeal, that the engineer was liable in tort to the owner, whom he knew was relying on him, for not warning him at the time he wrote to the inspector and also under the *Hedley Byrne* principle in regard to the certificate he had issued.

- Damage by Digger Operator to Underground Cables:

²⁰ 2 NZLR 1973 p. 385

²¹ 76 DLR 3d (1997) p. 721

In *Clark Contractors Ltd v. Drewett*²² a digger operator was sent by his employers to a site with his machine and was negligently misinformed by the contractor's foreman when he asked if there were any cables in a road, which his line of work was required to cross. He damaged post Office cables and was forced to pay a fine. Held by Richardson J. applying *Hedley Byrne* case, that defendants by their foreman had assumed responsibility for giving accurate information, and were liable to reimburse the operator.

- Wrong Estimation of Building Cost:

In *Abrams Ltd v. Ancliffe*²³ a builder after being shown preliminary floor plans and elevation confirmed an earlier estimate to a developer that the cost of two proposed residential units would be \$30,500 and the developer made appropriate financing arrangements. Later the builder received detailed specifications from the architects, which he realised would be more expensive, but in spite of many inquiries as to final cost he gave no indication of an altered estimate until over \$8,000 of work had been done, when he said the final price would be \$57,000. The developer would have continued at a highest price of \$ 40,000 and ultimately finished by another builder, but was unable to sell the houses profitably at the time of trial was letting them. Held by Casey J., although the original estimate was not negligent, there was here a special and continuing relationship of trust and confidence in the builder by the developer who relying on the original estimate, drifted into an irreversible commitment to build at an uneconomic figure. The

²² 2N Z L R 1977 page 556

²³ 2 N Z L R 1978 p. 420

builder should have told him of his doubts by the time work was due to start, and was liable in damages.

- Negligent Statement regarding design of Television Mast

In *IBA v. EMI*²⁴ design and erection sub-contractors for a television mast started work, and later received an inquiry from the owners about its design, as a result of vibration and oscillation difficulties experienced by the owners with other masts elsewhere they replied we are satisfied these structures will not oscillate dangerously. As a result work continued without modification and the mast was completed, but subsequently failed.

Held by the House of Lords, that the statement had been negligent, and the sub contractors were liable to the owners under the Hedley Byrne principle.

- Liability to Valuation report

In *Yianni v. Edwin Evans*²⁵ a building society made a maximum loan of £12,000 to house buyers on the basis of a valuation report of their own surveyors, for which the buyers had to pay. The buyers were advised to obtain an independent survey, and also received statutory notification that the loan did not imply that the price was reasonable. Shortly after, subsidence occurred costing £ 18,000 to repair, and the buyers sued the surveyors in tort. They admitted negligence, but denied that they owed any duty to the buyers.

Held by Park J., that the surveyors know the valuation would be passed on to the plaintiffs, who could be expected to rely upon its correctness in deciding to buy, notwithstanding the disclaimer as to the reasonability of the price. Accordingly there was a sufficient relationship of proximity in accordance with Hedley Byrne to render the surveyor liable to the buyers.

²⁴ 40 BLR 1980 p. 142

²⁵ 1 QB 1982 p. 438

- Certification

Certificates in construction are statements of opinion of the architect. These certificates are of great importance because financial consequences will frequently follow upon reliance on them.

In *Pacific Associates Ltd. V. Baxter*²⁶ dredging contractors operating under a FIDIC style contract with an ICC arbitration clause made a "Clause 12" unfavourable conditions claim for hard materials. The engineer rejected this on the grounds that the conditions were foreseeable. Subsequently the contractors asked for a decision of the engineer under clause 67 of the conditions, and then took a claim for £ 10 million. They, then, brought an action in tort against the engineer for their full loss, giving credit for sum received, alleging negligence and breach of a duty of care by the engineer when reconsidering and deciding their claim as required by clause 67 of the contract. Details of the engineer's contract with the owner were not known, but by clause 85 he was not to be an arbitrator when deciding or certifying, but to use his professional skill and knowledge of the works, and was not bound to give reasons: by clause 86 neither the engineer nor his staff were to be personally liable for the acts or obligations under the contract, or answerable for omission on the part of the employer in the observance or performance of any of the acts, matters or things which are herein contained, clause 67 was in the FIDIC third edition form permitting immediate arbitration of a disputed engineer's decision. Held by the court of Appeal, that the claim should be struck out as disclosing no cause of action:

- Opinion as to aircraft noise effects on property

²⁶ 1990 1 QB 993 CA

Recently, the House of Lords dealt with the issue of consultant's negligence in *Farley v Skinner*²⁷. The facts of the case can be summed up as follows:

Mr Farley, who was a businessman, who wanted to retire to the country and chose to buy a house in Sussex, some 15 miles from Gatwick Airport.

He engaged Mr. Skinner to survey the property. As well as having to investigate the usual matters expected of a surveyor, Mr. Skinner was specifically asked by Mr. Farley to investigate whether the property would be affected by aircraft noise. Mr. Farley told Mr. Skinner he did not want a property on a flight path. Mr. Skinner provided a satisfactory report on the property. On the subject of aircraft noise, he reported that he was not conscious of this during the time of his inspection, and thought it unlikely that the property would suffer greatly from such noise, although some planes would inevitably cross the area, depending on the direction of the wind and the positioning of the flight path.

In fact, the house was not far from a navigation beacon, the Mayfield Stack, and at certain busy times, especially in the morning, the early evening, and weekends, aircraft waiting to land at Gatwick Airport would be stacked up maintaining a spiral course around the beacon until there was a landing slot at the airport. Aircraft frequently passed directly over or nearly over the house.

The impact of aircraft noise on the property was marked, as Mr. Skinner could have readily discovered if he had checked with Gatwick. Ignorant of the aircraft noise problem, Mr. Farley proceeded to purchase the house and spent £125,000 refurbishing it. When he moved in, he promptly discovered the noise problem, but decided not to sell. Mr. Farley duly sued Mr. Skinner for damages for a diminution in the value of the property caused by the aircraft noise. The trial judge found that Mr. Skinner had

²⁷ (2001) 3 WLR 899

been negligent and that if he had carried out his instructions properly, Mr. Farley would not have bought the property. The House of Lords unanimously allowed the appeal.

Lord Scott of Foscote thought the case could be decided by the principles stated in 1854 in *Hadley v Baxendale* to the effect that, if Mr. Skinner had done his job properly Mr. Farley would have obtained the correct information about aircraft noise (i.e. the benefit of his bargain with Mr. Skinner) and would not have bought the house.

In general, the position of Sudanese law is similar to that of English Law regarding the existence of a special duty between the plaintiff and the maker of the statement. In the case of *Nile Import and Export Company Ltd. vs. Mohammed Nuri Osman*²⁸ stress has been laid on the necessity of the existence of special duty between the plaintiff and the maker of the statement. It was held in that case:

“A plaintiff cannot recover damages in an action for negligence for loss caused to him by a negligent statement unless he can prove that the maker of the statement was under special duty to him to be careful and the maker has failed to exercise such duty.”

ii) Nuisance:

Nuisance as a tort arises when the defendant interferes with the plaintiff's land. Interference could be classified into physical injury to the land and interference with the enjoyment of the land.

Lord Westbury drew the distinction between the two categories of nuisance in the case of *St. Helen's Smelting Company v. Tipping*²⁹ in the following quotation:

²⁸ SLJR 1967 p. 184

²⁹ (1865)11 HL Cas 642

“It appears to me that it is a very desirable thing to mark the difference between an action brought for nuisance upon the ground that the alleged nuisance produces material injury to the property and an action brought on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, any thing that decomposes or injuriously affects the senses of the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town it is necessary that he should subject himself to the consequences of those operations of town, it is necessary that he should subject himself to the consequences of those operations of trade, which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large...I think, my Lords, that in case of that description the submission required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property”.

According to the abovementioned precedent a defendant to an action in nuisance would normally raise the defense of “reasonable use of the land”, but many factors have to be considered in order to decide on such a defense. Typical relevant matters are:

- The seriousness of the interference.

- The duration of the interference.
- The locality.
- The motivation of the defendant.
- Whether the defendant's use of his land is or is not ordinary.
- The impracticability of avoiding the interference.

The above factors are relevant to construction work because although nuisance often causes substantial inconvenience to the neighbours but the above factors have to be proven in order to decide whether or not such nuisance is actionable.

The case of *Andreae v. Selfridge & Co.*³⁰, the defendants undertook very large construction activities in Oxford Street in London in the 1930s. The plaintiff who was in business as an hotelier in the neighbourhood, complained that the construction was causing a nuisance. The argument by the plaintiff was dismissed on the grounds that the activities were normal and that it was reasonable in view of the developments of the day.

But, Sir Wilfrede Green MR, nevertheless, found that there was an actionable nuisance on the grounds that the amount of the dust, which emanated from the site, was excessive. He went on to make general observations as follows:

- **Interference with the comfort of neighbors can only be justified as normal and usual if conducted under proper care and skill.**
- Proper precautions should be taken and the nuisance should be reduced to the minimum.”

a) Distinction between nuisance and trespass:

³⁰ (1938) 1 Ch p.1

Wallace elaborated on the distinction between nuisance and trespass³¹. In his opinion nuisance is to be distinguished from trespass with which it, in some cases, overlaps in that it usually arises from an unreasonable state of affairs on the occupier's land as a result of which the use or the enjoyment of the plaintiff land is impaired or in some cases physical damage is done to property or person, for example by flood resulting from blocked drains on the defendant's land or by cricket balls from a ground which is too small.

Thus unguarded scaffolding from which objects fall onto adjoining land might well qualify. The fact that such a nuisance is created by an occupier or by persons on the land of another as, for example, by contractor's negligence, will be irrelevant. Moreover even if the defendant does not himself create the nuisance he will be liable if he knows or ought to know of it and has allowed it to continue. Similarly if the nuisance is due to a latent defect where the occupier could, with reasonable care, have known of it. Thus there is very little scope for the defense of no negligence. In practice the burden of proof of showing inevitable accident or absence of fault will shift to the defendant unlike other cases of negligence.

However, unlike trespass a nuisance is not actionable without proof of damage whether in form of physical damage or interference with enjoyment or use of plaintiff's land. The question of nuisance or no nuisance will often be a relative one involving concepts of reasonableness and differing with the locality and types of premises.

Thus in the case of noise a common accompaniment of building or demolition the question will be what is an unreasonable level of noise after taking account of

³¹ I.N. Duncan Wallace, Hudson's Building and Engineering Contracts 12th edition pp. 202-203

reasonable restrictions on hours of working and of what is reasonable in a business district for example.

The duty in nuisance, also, appears to be non-delegable, so that an owner will be liable for a private nuisance caused by his independent contractors.

Acts, which may amount to nuisance, can never be confined to any limited variety of examples. The following cases illustrate a few examples:

- Nuisance caused by blocking a “khor”

In *Town Council of Omdurman v. El Nur Ibrahim*³² the defendant Council constructed a culvert in the passage of a Khor adjoining the plaintiff's house; the culvert was too narrow with the result that the Khor was obstructed and rainwater overflowed into the plaintiff's premises. The defendant Council also established a market near plaintiff's house and failed to provide latrines, with the result that people from the market used the Khor instead. In an action on these facts, Held: (i) the defendant was liable in nuisance and negligence for causing the overflow of water (ii) That since the nuisance arising from the use of the Khor as a latrine was neither created nor authorized by the defendant Council and occurred without their knowledge no action lay. The proper remedy was criminal proceedings against individual members of the public creating the nuisance.

- Nuisance caused by droppings of pigeons:

In *Wandsworth London Borough Council v Railtrack plc*³³, pigeons' droppings fouling pavement below bridge was held to be causing inconvenience, danger and

³² HC/Revision/187/58- AC/Revision/32/59- SLJR 1960

³³ Unreported, published by The Incorporated Council For Law Reporting For England And Wales (ICLR) 2003.

health hazard to pedestrians and the Highway authority was allowed to pursue claim in public nuisance.

The facts were that feral pigeons roosting under a bridge fouled the pavement beneath and caused inconvenience to passing pedestrians with their droppings, thereby interfering with the right of the public to use and enjoy the public highway. The owners of the bridge were held liable to the highway authority in public nuisance because they knew of the nuisance and had the opportunity and means to abate it but had failed to do so.

The Court of Appeal so held in dismissing an appeal by the defendant and held that the defendant was liable in public nuisance for the fouling of the public highway caused by pigeons roosting under the defendant's railway bridge in Balham High Street.

Kennedy LJ stated that it had been clear that where there was a public nuisance on the defendant's land it did not matter whether it had been created by the defendant or some third party, or by natural causes. If the defendant was aware of the nuisance, had had a reasonable opportunity to abate, had the means to abate it, and had chosen not to do so, then he was liable. See also, *Slater v Worthington's Cash Stores*³⁴.

It was clear beyond argument that interference with the right of the public to enjoy the highway in a reasonable comfort and convenience could amount to a public nuisance. So the judge had been entitled to find as a fact, as he had, that in this case there was a public nuisance. The defendant had submitted that pigeons proliferated because the community provided food, and so the local authority, representing the community,

³⁴ (1930) Ltd [1941] 1 KB 488

should solve the problems by the exercise of statutory powers given to it in section 74 of the Public Health Act 1961 to abate any nuisance, annoyance or danger caused by the congregation of pigeons in any built-up area, and by the exercise of its contractual and statutory street cleaning obligations.

But that argument was rejected on the ground that the claim was not concerned with the problem of pigeons in general. It was concerned with the nuisance caused by the pigeons, which roosted under the railway bridge, and that was a nuisance, which the defendant had a clear legal duty to address.

It is noteworthy that the decision in this case is different from the decision in the Sudanese precedent of Town Council of Omdurman, referred to in the above bullet. Comparison might not disclose too much dissimilarity between the two cases if we accept the fact that in both cases the owners created structures, which were likely, in the circumstances, to attract the causes of the nuisance in question.

iii) Trespass to land:

Trespass to land is the unjustifiable interference with the possession of land. Possession might be of two types; possession in fact and possession in law.

Trespass was defined by Sudanese law in the Sudanese precedent Naima Hassan and Another vs. Mursi Hassan³⁵ where it was held that:

“A person who has lawfully entered on land belonging to another remains on the land after his right of entry has ceased commits a trespass.”

³⁵ SLJR 1962 p. 86

Possession in fact is also referred to as custody, detention or de facto possession. This type of possession is defined as power to use the land and exclude others from using it provided that no one else has equal or greater power.

Possession in law normally exists in conjunction with possession in fact but its practical significance is that in some cases a person may part with possession in fact but still retains possession in law and can sue for trespass.

Construction activities can result in some kind or another of trespass to land. Three common examples may be mentioned in this context.

- Interference:

Interference with the possession of land may occur in many ways, for example the unauthorized walking into the land by the contractor's workers on or going into the buildings upon it, but it is equally trespass if building materials are allowed to fall into the land or even a ladder is placed by a worker on the wall of the neighboring land.

Doing the same in excess of a permission to enter the neighboring land or after such permission expires is also trespass. The difference between trespass and nuisance is sometimes elusive, the rule is that for trespass the injury must be direct and immediate but if it is indirect and consequential there may be a remedy for nuisance³⁶.

- Trespass to subsoil:

An intrusion into the subsoil is trespass against the person in possession of the subsoil, an example of this can be the construction of a tunnel³⁷.

- Trespass to the airspace:

³⁶ Winfield & Jolowicz on Tort 11th edition p.339

³⁷ *Ib.* at p 340

It was held in the case of *Kelsen v. Imperial Tobacco Co*³⁸, also referred to in the examples below, that an advertising sign erected by the defendants on their own property which projected into the airspace above the plaintiff's shop, created a trespass. But it was stated that the building's owner's rights in airspace extends, only, to the height which is necessary for the ordinary use and enjoyment of the land and structures on it, so the flight of an aircraft several hundred feet above a house is not a trespass.

The difference between trespass and nuisance was further highlighted. It was stated that trespass differs from nuisance in its involvement of a positive act of interference or entry however slight into the property of the plaintiff. It is actionable, unlike nuisance, without proof of damage. It, also, involves a degree of deliberation thus scaffolding from which objects are likely to drop onto property is a nuisance but objects thrown down onto adjoining land is a trespass. Ignorance of the boundaries will be no excuse. The slightest violation of a boundary will be a trespass such as placing objects on the plaintiff's land, driving nails into his wall, using it to support scaffolding or leaving a ladder planks or a shed or piling rubbish against it. It is also a trespass to make excessive use of a private right of way.

Trespass equally includes a violation of the airspace above the plaintiff's land at any rate at a height, which would interfere with any possible use of his land.

Moreover an injunction is obtainable as of right and as a matter of course in the case of continuing trespasses and there is no question of balancing the plaintiff's interest against that of the defendant or of the public and it will be irrelevant that the plaintiff has in fact suffered no damage.

³⁸ 1957 2 Q.B p. 334

The following examples can help to illustrate a few examples of trespass in English law:

- Projecting Advertising sign:

In *Kelsen v. Imperial Tobacco Co*³⁹ an advertising sign was erected projecting into airspace above the plaintiff's property. He claimed a mandatory injunction for its removal. The defendant argued that, at best, the sign constituted a nuisance, and that there was no inconvenience for the plaintiff. Held, by MacNair J. that the sign was a trespass and even if there was no inconvenience the plaintiff was entitled to his injunction:

- Scaffolding partly over neighboring land:

In *John Trendbest Ltd v. National Westminster Bank*⁴⁰ an adjoining owners building was dangerous and needed repair. His neighbor refused a request for a license to put scaffolding partly over and partly onto his property. The defendant nevertheless proceeded to erect the scaffolding. The plaintiff sought an injunction. The defendant asked for a suspension of the injunction while the repairs were carried out. Held by Walton J not following Stamp J. who had granted but suspended an injunction where a tower crane had over sailed adjoining property (*Wollerton & Wilson Ltd. V. Costain Ltd.*⁴¹ an injunction must issue as a matter of course and no suspension could be granted notwithstanding that the damage suffered would be so slight as to be trivial.

- Tower Crane swinging over neighboring land

Occupiers of three properties sought an injunction against the use by a developer of two tower cranes whose booms whether free, swinging or in use would over sail their properties. In only one case was there any possibility of interference with the use of that plaintiff's property, and that in the future when the owner

³⁹ *ibid* at 334

⁴⁰ (1980) 439 P&C. R. 104

⁴¹ (1970) 1 W.L.R 411)

might himself wish to develop using a tower crane. The cranes were too high to interfere with the normal use of any of the properties so that no damage at all would be suffered. The development was of a nature where it would be reasonable and economic to use tower cranes

It was contended that the cranes were, at most, a nuisance and that in the absence of proof of damage the action must fail; Held, by Scott J following the Kelsen and Woolerton cases the invasion of a neighbor's airspace was trespass and proof of damage was not required.

Trespass following Trendbest and not following Woolerton did not depend upon any balancing of rights nor was the balance of convenience at the interlocutory stage of any relevance and the injunction must issue forthwith (Anchor Brewhouse v. Berky House)⁴²

It should perhaps be noted that in trespass cases such as the above it has been held that damages can be recovered on the basis of a reasonable payment or remuneration for licensing the trespass.

In Sudanese law we can see further specific issues related to trespass in section 608 of the Civil Transactions Act 1984

The section reads as follows:

“Where a person, out of materials belonging to him, constructs buildings or other structure or grew plants on land which he knows it does not belong to him and he has no right to carry out such structure thereupon, or where his lack of knowledge is attributable to a grave mistake on his part, the owner of such land may, within one year of the date of such construction, claim the removal of such structures in addition to compensation for damage, if any.

⁴² 435 BLR 87

If he did not claim removal or elected to retain such structures, he shall be liable to indemnify the owner of the materials to the extent of its value when served, or to pay a sum equivalent to the enhancement in the value of the land.

(2) Where the person who constructed the building or structures or grew the plants, referred to in the above sub-section obtained a license from the land owner, or he honestly believed that he has a right to perform such acts, the land owner shall not be entitled to claim removal thereof, but he shall have the option either to pay the value of such materials and the costs of labor or to pay a sum equivalent to the enhancement in the value of the land brought about by such improvements; that is in the case where the owner of the materials did not demand severance and such severance will not seriously prejudice the land.

However, if those improvements were of such a magnitude that it will be financially burdensome for the land owner to pay for them, he may apply for the transfer of the ownership of the land to the owner of the materials on payment of just compensation.”

(3) The court may, on the application of the party liable to pay compensation according to sub-sections “1” and “2” to decide what it deems suitable to execute its judgment, and it may especially decide that execution shall be in periodical installments on condition of sufficient securities.”

Section 609 empowers Sudanese courts to adjust the situation of a trespasser who commits a negligible trespass on land in good faith as follows:

"Where a land owner, while constructing buildings encroaches, in good faith, over a trifle portion of the adjoining land, the court may order the transfer to him of the ownership of the occupied portion on payment of a just consideration."

iv) The tort of interference:

Winfield defines the tort of interference as follows: A commits a tort if without lawful justification he intentionally interferes with the contract between B and C (a) by persuading B to break his contract with C or (b) by some other act perhaps only if tortious in itself which prevents B from performing his contract.

Winfield has explained the essentials of the tort of interference as follows⁴³:

- It has to be established that A has brought a breach of contract between B and C. The causal connection between A conduct and the breach requiring strict proof. It is therefore not tortious to persuade a person lawfully to terminate a contract and there is no tort if the contract allegedly broken proves to be void.
- The plaintiff must prove that he has suffered damage as a result of the breach of the contract.
- It is often stated that A must have acted with knowledge of the existence of the contractual relations between B and C.

v) Breach of Statutory Duty:

The ingredients are as follows:

a) The statutory duty must be owed to the plaintiff: The defendant in question must

⁴³ Winfield & Jolowicz on Tort (11th) edition 1979, p. 479

owe a duty to the plaintiff according to the statute as some statute are so express as to limit the classes of persons who benefit from them. In *Hartley v. Mayoh & Co.*⁴⁴ a fireman was electrocuted while fighting a fire at the defendant's factory. His widow relied inter alia upon the breach by the defendants of their obligations under certain statutory obligations but these existed only for the protection of persons employed and firemen did not come within this description. The claim for breach of statutory duty thus failed.

- b) The injury must be of a kind which the statute intends to prevent.
- c) The defendant must be guilty of breach of his statutory obligation.
- d) The breach of duty must have caused the damage.

The duties laid down by the Civil Transactions Act 1984 regarding “Personal, Occupational and Professional Harm” provide examples for statutory

⁴⁴ 1954 2 QB 138

duties the breach of which constitutes a breach of tortious liability.

Section 160 provides that any person who is employed by another or is engaged in work for another and thereby causes harm to that other person or anyone else through the abuse of his position, disregard of his duties or unjustified negligence in its performance shall be personally liable to pay compensation for the harm caused to others. According to the section the term “others” include juristic as well as natural persons. It can therefore be taken as a tortuous duty imposed by statute.

The Act gives examples of personal, occupational and pprofessional harm in section 162.

The section does not refer to particular cases, which can be taken as construction examples but sub-sections (i) and (j) can be applicable to construction as well as other cases. The two sub-sections read as follows:

"Giving misleading professional advice with the intention of causing harm to another or in reckless disregard of the rights of the person seeking advice and without regard to the requirements of normal effort expected of an advisor.

If the other party is state, it may constitute personal occupational and professional liability to exercise unlawful partiality in any public business or business of a public nature, the abuse of occupational position to conclude losing or illusionary transaction or cause personal gain or conduct negotiations which are harmful to the state whether that was due to negligence or recklessness or in order to cause wrongful gain to himself or another, as well as preparing false or misleading reports in any business of a public nature or in relation to a public servant , whether to cause benefit or harm ."

According to the section, personal occupational or professional liability is presumed wherever the harm is too serious to occur without gross negligence or bad faith.

Any Sudanese citizen is entitled to ask the Attorney General to sue for personal occupational or professional liability whenever the party suffering harm is the State or one of its public utilities.

In the case of *Osman Mohammed Ahmed Al Ga'ali v. Mahmood Irahim Hilmi*⁴⁵ the issue in question was the causing of damage while negligently doing an act authorized by the legislator. It was held by the Court of Appeal that a person who is authorized to do an act by a legislator is liable for negligence because he must use reasonable diligence in doing such act.

Daffalla Al Radi J stated the following:

“ It is true that applicant pulled down the buildings while so authorized by the municipality, we are not questioning his authority. Applicant ought to have used diligence and steps to avoid as much and as practically as possible the causing of damage to respondent.

He failed to do so on his own peril. It has been said in *David Geddis v. Proprietors of the Bann Reservoir*⁴⁶: -

“ For I take it without citing cases that it is now thoroughly well established that no action will lie for that which the legislator has authorized if it be done without negligence although it does occasion damage to any one; but an action does lie for doing that which the legislator has authorized if it be negligently done.”

Applicant, it is clear from the record, ransacked the place and hence, at least acted negligently if not maliciously.”

⁴⁵ SLJR 1970 p. 15

⁴⁶ 1878 A.C. 430 at 455.

We have repeatedly expressed our reluctance to disturb findings of fact in absence of flagrant violation of the rules of evidence and reasons. The learned District Judge made it clear in discussing applicant's testimony that he could not believe applicant's witnesses. He is the best judge on the facts no doubt."

The above decision is in line with the earlier precedent of Hamad Al Noor vs. Modern Aluminium Works⁴⁷ where there was a breach of statutory duty under The Workshops and Factories Regulations ss. 33(1) 37,44.

The same issue arose, too, in the case of Khartoum Municipal Council v. Michele Cotran⁴⁸ where the exercise of powers granted under the local government Ordinance 1951 was in question.

In that case the defendant had dug a drain between 4.5 and 5 meters from the side of an unlit road in a residential area in Khartoum. The drain was uncovered, unlit and unguarded but in the night in question there was dim light shed on it from nearby. The plaintiff, a district judge and his companion arrived in the road by car to attend a party at the Iraqi Embassy and were obliged to leave the car about 150 yards from their destination. The plaintiff left the road in order to avoid a traffic jam and in attempting to take a short cut fell into the drain. As a result he suffered injuries to his left foot

⁴⁷ SLJR 1960 p. 129.

⁴⁸ SLJR 1958 p.85.

involving a surgical operation (arthrodesis) and considerable pain and suffering. The final outcome was a stiff painless useful foot amounting to a 70% disability.

The judge of the High Court Khartoum found out that the defendant was guilty of negligence and awarded 7.332.850 Sudanese Pounds as damages; 2.332.850 as special damages and 5.000.000 as general damages as general damage.

Held:

1. The author of danger immediately adjoining a public highway owes a duty of care to lawful users of the highway whether or not the danger is in law part of the highway.
2. The immunities attaching to a private owner who dedicates a highway to the public do not extend to public authorities acting in pursuance of statutory powers or duties.
3. An unlit, uncovered and unguarded drain 2.5 meters wide and 2 meters deep immediately adjoining a highway does not constitute an insignificant danger to which the defense *de minimis non curat lex* can apply.

The power given to the council was permissive and discretionary but there was nothing in the Ordinance to override the common law presumption that the power when exercised should be exercised with due care. The appellant owed a duty to users of the highway and having failed to exercise reasonable care was liable in negligence. In the *Heirs Of Rahamtalla Ahmed El Medina V. Sudan Light And Power Co*⁴⁹ The deceased, an employee of defendants, walked over the checker plates covering the sump of a boiler in a yard on defendants' premises. Owing to defendants' negligence the sump was not guarded and the checker plates were not properly secured, with the

⁴⁹ HC-CS-20-1959

result that, when the deceased stepped on the plates, they moved, and he fell through the opening into the hot water in the sump and was killed. Plaintiff, the widow, children and parents of the deceased, sued as heirs and dependants of the deceased for damages for the deceased's death. Defendants admitted their own negligence, but claimed that the deceased was contributorily negligent in walking over the sump, which he knew to be dangerous, and could have avoided. Defendants also disputed plaintiffs' assessment of damages. Held.: Defendants were liable for breach of statutory duty, i.e., for breach of Workshops and Factories Regulations 1952, r. 9.

vi) Liability For Dangerous Structures And Occupier's Liability:

By this title concern is laid on the duties of the occupier of dangerous structures to persons who enter therein. Winfield says⁵⁰ that liability for dangerous structures forms a special sub-head of the general doctrine of negligence. The duties are owed to four kinds of persons in the following descending scale:

- a) The highest degree of care is owed by the occupier to one who enters in pursuance of a contract with him.
- b) A less degree is due to an invitee who without any contract enters on business of interest both to himself and the occupier.
- c) Still less is due to the invitee who comes on the occupier's permission on business of interest to himself but of none to the occupier.
- d) Scarcely any, at all, to a trespasser. The only duty of the occupier to a trespasser is not to injure him deliberately or recklessly.

⁵⁰ Winfield & Jolowicz on Tort (11th) edition 1979, p. 192

- Liability towards a trespasser who dived into a dangerous lake in Public Park

In the case of *Tomlinson v Congleton Borough Council and another*⁵¹ Ward, Sedley and Longmore LJ: discussed the issue of occupier's liability to a trespasser who swam in a dangerous lake situated in public park. The claimant got injured when he dived in the lake despite warning notices prohibiting swimming. It was found by the court that by virtue of s 1 of the Occupiers Liability Act 1984 a local authority which was well aware that its "no swimming" policy was habitually being flouted by persons who went into a lake in a public park owed a duty of care to provide effective protection against the grave risk of injury to such persons. The authority's placing of warning notices and use of park rangers did not establish that it had taken reasonable care to prevent injury.

The Court of Appeal (Longmore LJ dissenting) allowed an appeal by the claimant, John Peter Tomlinson, from the dismissal by Jack J, sitting in Manchester in March 2001, of his claim for damages for severe injuries against Congleton Borough Council and Cheshire County Council. An assessment by the judge of two-thirds contributory negligence by the claimant made on the basis that liability was established was upheld by the court and an order made remitting the case for damages to be assessed. The facts of the case were as follows:

On a hot day in May 1995 the claimant, aged 18, went with friends to Brereton Heath Park in which a disused quarry had for many years formed a lake. Ignoring warning signs, he went into the lake and was seriously injured as a result of making a shallow dive. The council that owned and occupied the park was aware that in hot weather the

⁵¹ AC 14 March 2002 (unreported)

lake was a magnet to the public, its sandy beaches inviting swimming. It knew of the dangers to swimmers and the disregard of warnings. It planned to landscape and plant the beach areas as a deterrent. That work was not completed at the time of the claimant's accident.

Ward LJ said that the claimant accepted that by going into the water he ceased to be a visitor and became a trespasser. S 1 of the 1984 Act defined when an occupier owed a duty to persons other than visitors and, if so, what the standard of care was. It was essential that those provisions acted as a template in every case. The council's warnings over many years were known to be ineffective to prevent swimming and the grave risk of injury to those entering the water. The circumstances were such as to impose a duty on the council to carry out the planned landscaping as an effective deterrent to swimmers. It followed that the council was in breach of the duty it owed to the claimant to take reasonable care to see that he did not suffer injury at the park by reason of the dangers awaiting those who entered the water to swim.

Sedley LJ gave a concurring judgment.

Longmore LJ, dissenting, said that there were obvious dangers in swimming in any stretch of water other than a swimming pool. That the council promoted the site for leisure activities did not require it to prevent swimming unless it knew of a particular hazard. Even then to give a warning of such hazard should probably suffice.

This English common law approach was dealt with by The Occupier's Liability Act 1957 where liability of the occupier was reduced to two categories, one was lawful visitors and the other was trespassers.

Implied permission is to be dealt with very carefully as well. Examples of implied permission could be permission for persons who enter the premises to communicate with the occupier unless he precludes them by notice or otherwise.

- Liability towards a trespasser who dived into a tidal harbor

In *Donoghue v Folkestone Properties Ltd*⁵²: - Lord Phillips of Worth Matravers MR, Brooke and Laws LJ: 27 February 2003, the same previous issue was raised in different circumstances where an adult trespasser dived into tidal harbour at low tide in midwinter and was injured by submerged grid bed. The issue was whether there was a duty owed by harbour owners to trespasser under Occupiers' Liability Act 1984, s 1(3)(4)

It was found that a harbour owner owed no duty under the Occupiers' Liability Act 1984 to a trespasser injured by striking hidden grid piles because the owner as occupier had no reasonable grounds to believe that a trespasser would come into the vicinity of the danger within s 1(3)(b) of the Act by diving into the harbour late at night in midwinter. The Court of Appeal so held, allowing the appeal of the defendants, Folkestone Properties Ltd against the judgment of Judge Bowers sitting as an additional High Court judge, on 23 September 2002 for the claimant, John Simon Donoghue with a finding of 75% contributory negligence.

Lord Phillips of Worth Matravers Mr said that Mr West for the defendants accepted that had the claimant been among those whom the defendants knew were accustomed to swim in the vicinity of the harbour slipway in the summer, they would in the summer have owed a duty to protect him by posting a warning. His appeal was founded on s 1(3)(b).

⁵² [2003] EWCA Civ 231 CA

He submitted that the duty to offer some protection to a trespasser against a danger only extended to the times when an occupier had reasonable grounds to believe that the trespasser might be in the vicinity of and at risk from the danger. As there were no reasonable grounds to believe that anyone would be swimming near the slipway in the middle of the night in midwinter, no duty was owed to the claimant when he had his accident.

In *Ratcliff v McConnell*⁵³ Stuart-Smith LJ endorsed the proposition that the existence of the duty had to be determined by reference to the likelihood of the trespasser's presence in the vicinity of the danger at the actual time and place of danger to him. Those observations did not support the proposition that, when applying s. 1(3), it was appropriate to ask whether a duty was owed to a class. Consideration of a class of trespasser might be helpful when approaching the question raised by s 1(3)(b) of whether the occupier had reasonable grounds to believe that the trespasser might come within the vicinity of the danger.

It was enough if the trespasser could show that he was one of a class of persons whom the occupier had reason to believe might be in the vicinity of the danger. Once, however, s 1(3)(b) was satisfied, it became necessary to consider whether any duty was owed to the particular member of that class who suffered the injury. In *Tomlinson v Congleton Borough Council*⁵⁴ Ward LJ drew a distinction between the approach to s 1(3) as a duty owed to the claimant as a member of a class whereas s 1(4) focused on the duty to the individual claimant. His Lordship did not consider that distinction to be valid. "The other" in s 1(3) was the same person as "another" in s 1(4), namely the very individual who had sustained the injury.

⁵³ [1999] 1 WLR 670

⁵⁴ [2002] EWCA Civ 309

The circumstances material to the existence of a duty might change with the seasons or the time of day. At the time the claimant sustained his injuries the defendants had no reason to believe that he or anyone else would be swimming from the slipway. Brooke LJ delivered a concurring judgment. Laws LJ agreed.

- **Using an improperly footed ladder:**

In *McCook v Lobo*⁵⁵ the claimant, who was employed as a general labourer by the third defendant building contractor, injured his back when he fell from a ladder while carrying out repair and conversion building work at premises owned by the first defendant and intended for use by the second defendant. In proceedings by the claimant for damages for personal injuries, the judge concluded, on a preliminary issue as to liability, that the claimant was at all times employed by the third defendant who had control over the work he performed and that the claimant fell off the ladder as a result of the third defendant's negligence at common law and breach of provisions in the Construction (Health, Safety and Welfare) Regulations 1996.

The judge also found that the first defendant did not have control over the way the claimant carried out his work and so was not in breach of regulation 4(2) of the 1996

⁵⁵ [2002] EWCA Civ 1760 CA

Regulations; that, on the assumption that the first defendant was in breach of regulation 10 of the Construction (Design and Management) Regulations 1994 in failing to prepare a health and safety plan in respect of the works of conversion, such breach was not in any way causative of the claimant's injury and loss; and that there was no basis for any claim against the first defendant under the Occupiers' Liability Act 1957. The judge accordingly dismissed the claim against the first and second defendants, and he gave judgment for the claimant, to the extent of 75%, against the third defendant.

The claimant appealed.

The Court of Appeal held: (1) It was inappropriate and unnecessary to treat potential liability at common law as distinguishable from the common duty of care owed by an occupier of premises under the Occupiers' Liability Act 1957 unless a distinct simultaneous duty also arose, for example, from the relationship of employer and employee. On the facts as found, the first defendant's duty to the claimant in negligence was confined to compliance with the common duty of care under the 1957 Act, and such duty, taken at its highest, did not require the first defendant to take precautions to see that the ladder from which the claimant fell was footed or secured while he was working from it, nor to ensure that the third defendant building contractor had given express instructions to the claimant not to use the ladder when it was not properly footed, nor to inquire from any other employee of the third defendant whether he appreciated the risks of mounting and working from an improperly footed ladder. (2) The required control under regulation 4(2) of the Construction (Health, Safety and Welfare) Regulations 1996 was related to control over the work of construction, and whether the appropriate level of control was or

should be exercised by an individual other than a contractor as employer was a question of fact for the judge.

That question was not answered affirmatively by demonstrating that the individual had control over the site in a general sense as an occupier, or that as the occupier he was entitled to ask or require a contractor to remove obvious hazards from the site, or that he enjoyed power to control the site. A failure to provide an appropriate health and safety plan in accordance with regulation 10 of the Construction (Design and Management) Regulations 1994 did not create the element of control of a site which was the prerequisite to any duty arising under regulation 4(2). Notwithstanding the concession made by the first defendant owner that he was in breach of regulation 10, given that the third defendant disregarded not only the statutory obligations owed to the claimant but the obvious and simple precaution to ensure the claimant would be safe when mounted on a ladder, the judge was entitled to conclude that the necessary causative link between the first defendant's breach and the claimant's consequent injury was not established. The appeal was dismissed.

- Warning of danger to Invitees:

Where a damage is caused to the invitee by a danger of which he has been warned by the occupier, the warning should not be treated as absolving the occupier from liability unless in all circumstances it was enough to enable the visitor to be reasonably safe.

If there is a probability of intrusion by children too young to appreciate the danger or understand the warning notice the occupier's duty may require the provision of an obstacle to their approach to the danger sufficiently difficult to surmount as to make it clear to the youngest unaccompanied child likely to approach the danger that beyond the obstacle is forbidden territory.

Pannett v. P. Maguiness & Co. Ltd⁵⁶ provides an illustration of the application of the mentioned principles in English law. The defendants were engaged in the demolition of a warehouse, which was close to a public park. At one stage the defendants found it necessary to remove the hoardings around the site and light fires. They knew these fires would be attractive to children so they posted three men to watch the fires and warn off children.

The plaintiff aged 5 had been warned off by these men but in the afternoon in question soon after school hours the men were absent from the site. The plaintiff entered the building, fell into a fire and was seriously injured. The court of Appeal upheld the decision for the plaintiff. In view of the situation of the warehouse the attractiveness of fires to children and the time of the accident there was a serious risk of which the defendants were in fact aware and they were responsible for the negligence of their servants in failing to exercise proper supervision. The plaintiff was aware that he ought not to go into the warehouse but this was not in view of his age sufficient protection for he could not fully appreciate the danger of the fires.

- Dangers hidden by Darkness:

It is not settled that if an invitee walks in darkness where he cannot see whether there is danger or not he does so at his own peril. There is no absolute rule of English law that in all cases an invitee moving in the dark takes the risk of any danger, which in daylight would be obvious. It has to be shown whether the occupier in the particular case must take reasonable care to make the place safe by lighting or otherwise eliminate the danger.

- Employer's visit to the site:

⁵⁶ 1972 2 QB 599

It was settled in English law⁵⁷ that the employer has no implied contractual right to enter the site at any time without the contractor's knowledge and to expect to find the site ready and safe for his visit. If the employer enters the site without warning and without the knowledge of the contractor it seems he does so at his own risk.

- Theft of Employer's property:

If the employer leaves his house empty during the performance of the work then it is the duty of the contractor to take reasonable care with regard to the status of the employer's house. This rule was laid down in the English case *Stansbie vs Troman*⁵⁸ where a decorator left alone in house goes out leaving it with catch of Yale lock fastened back. Held he was liable for theft while he was away.

3. Damages for breach of tortious liability:

(i)Remoteness of Damage:

In English law remoteness of damage is governed by the rule in the case of *Overseas Tankship (UK) Ltd. V. Morts Dock & Engineering Company Ltd. (The Wagon Mound-No.1)*⁵⁹. The defendants negligently allowed oil to escape from their ship. The oil spread across the water in the harbour.

The plaintiffs owned a wharf into which the oil drifted. The plaintiffs were undertaking welding work in their wharf and after receiving advice that the oil was not inflammable, they continued to weld. The oil did however catch fire and the wharf was badly damaged.

The plaintiffs sued for this damage The Privy Council held that the damage was not reasonably foreseeable since at that time it was thought that such oil could not catch fire while floating on water. The damage, which occurred, had to be of foreseeable type if it was to be recoverable. It was of no assistance to the plaintiffs

⁵⁷ Keating, Donald, Building Contracts, 3rd edition, p.147

⁵⁸ (1948) 3 KB at 48

⁵⁹ 1961 AC 388

that the defendants could foresee some damage to the plaintiff's wharf from, say, oil pollution.

The position in the Sudanese Civil Transactions Act 1984 does not address the issue of foresee-ability the way it has been addressed in English law. Section 384 of the Civil Transactions Act 1984 deals only with compensation for damage and loss although its general wording does not suggest that it applies exclusively to torts.

According to the Section compensation is due once it can be proven that it has arisen from the defendant's act. The only exception here is damage arising out of an unavoidable event.

The Section reads as follows:

"The contractor shall pay compensation for any loss or damage arising from his acts or work, whether intentional, negligent or otherwise. Compensation shall not be payable if such loss or damage is a consequence of an unavoidable event."

However this section should be read with reference to section 152 which provides that the court shall assess damages in accordance with the damage caused to the injured party provided that such damage should be the natural consequence of the harmful act.

Adoption of English law principles by Sudanese courts is uncertain in torts as it has been pointed out since 1958 in the case of *Khartoum Municipal Council v. Michele Cotran*⁶⁰ that the question of damages is a matter to be fixed by local considerations but English and other foreign cases should not be taken as guides.

It is believed that the ruling of the Court of Appeal in the mentioned case should not be viewed in isolation from the well-recognized approach of Sudanese courts to

⁶⁰ SLJR 1958 p. 85

English precedents i.e. that Sudanese courts could be guided although not bound by English precedents. Such an approach holds the same logic raised by the Court of Appeal for the necessity of paying careful attention to local consideration but it allows for reasonable guidance when similar issues are identified.

(ii) Causation:

In English law the test used to determine causation is the "but for test". In the case of *Cork v. Curby Maclean Ltd*⁶¹ Lord Denning remarked as follows:

“If the damage would not have happened but for a particular fault then that fault is the cause of the damage.”

The statement by Lord Denning was further explained in the case of *Barnet v. Chelsea and Kensington Hospital Management committee*⁶² where a doctor refused to treat a patient and the patient later died. The doctor was found not liable because by the time the patient presented himself for treatment he was so ill that no treatment was possible. Accordingly it could not be said that but for the doctor’s failure to treat the patient he would not have died.

This rule is important in construction as it can be applied to situations where the condition of a particular structure or part of it, for example, is irreparable to the extent that its fall or damage is inevitable regardless of any action or omission on the part of the defendant.

The position in Sudanese law can be illustrated by the case of *Sudanese Commercial Bank vs. Dawood Yousuf*⁶³ where the effects of interference by a third party were also discussed. The Court, after summing up the facts of the case, held that as a general rule the chain of causation between the act committed by the defendant and

⁶¹ (1952) 2 All ER 402

⁶² (1969) 1 QB 428

⁶³ SLJR 1979 p. 467

the damage caused to the plaintiff ceases to exist if the damage caused to the plaintiff is a result of a third party's act and not a direct result of the defendant's act.

However, the chain of causation will be affected if the act of another is done reasonably as a result of the defendant's negligence and the consequences of the act are not too remote.

Statutory law in the Sudan is in line with the general rule of causation. The Sudanese Civil Transactions Act 1984 Section 5 links liability to causation although it provides examples where no liability arises despite proof of causation. The relevant Sub-sections read as follows:

- (s) He who does an act directly is liable for it unless even if it is done unintentionally.
- (t) He who causes an act indirectly is not liable for it unless it is done intentionally.

(iii) Third party contribution to the plaintiff "Insurance":

In cases where a plaintiff suffers no actual financial loss because, for example, he is insured and an insurance company can make his loss good, he will, still, be entitled to substantial damages.

In *Linden gardens Trust Ltd. v. Lenesta Sludge Disposals*⁶⁴ Lord Justice Staughton discussed this issue:

"When a plaintiff initial loss has subsequently been made good by someone other than himself, the general rule is that he can recover only nominal damages. But there are certainly exceptions. An obvious example, which occurs every day, is when his insurers can compensate a plaintiff; nevertheless he can sue in his own name and recover substantial damages, although he may be bound to pay them to his insurers. Another example is to be found in the case of *Design v. Keniston Housing*

⁶⁴ 57 BLR 57

Association Ltd⁶⁵. There the loss of the counter-claiming defendants had been or would be made good by a grant from the Department of the Environment. It was held that the defendants could nevertheless recover substantial damages.

In the particular case of damage to a building, which is later sold, in my judgment there is no rule of law that the damages must necessarily be nominal. If, however, a subsequent owner has a claim in his own right in respect of the same damage, the law must find some solution to prevent double recovery.

4. Allegations of irrecoverable loss:

i) Failure of the plaintiff to mitigate his loss:

The general rule is that the defendant is liable for the loss, which comes as a reasonable and foreseeable result of his act. That general rule is subject to the important qualification, which is called the duty to mitigate.

This duty is applicable to damage, which happens as a result of breach of tortious as well as contractual obligations. It has been put by Lord Haldane in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways of London*⁶⁶ that:

"The fundamental basis of the general rule is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

ii) Remedial works carried to negligent extent:

⁶⁵ 34 BLR 92

⁶⁶ 1912 AC 673

In case of defects in the building the employer might carry out remedial works upon the advice of a consultant and then sue the parties responsible for the defects. If the parties challenge the magnitude of the damages claimed they might argue that the plaintiff spent excessive amount on remedial works and it is unreasonable to claim such amount against them. The same argument was raised in the case of *Board of Governors of the Hospital for Sick Children v. McLaughlin and Harvey plc and Others*⁶⁷.

Judge Newey held that:

“ The plaintiff who carries out either repair or reinstatement of his property must act reasonably. He can only recover as damages the costs, which the defendants ought reasonably to have foreseen that he would incur and the defendants would not have foreseen unreasonable expenditure. Reasonable costs do not, however, mean the minimum amount, which, with hindsight, it could be held would have sufficed. When the nature of the repairs is such that the plaintiff can only make them with the assistance of expert advice the defendant should have foreseen that he would take such advice and be influenced by it.”

His Honor went on to explain that if the expert advice is negligent, however, that may break the chain of causation so that the defendant might not be responsible for the cost incurred on negligent advice.

iii) Remedial works that constitute betterment:

In some cases the plaintiff might carry out remedial works to a higher standard than the standard required by the original contract. The position of English law on this

⁶⁷ (1987) Constr LJ Vol. 6 No. 3 p. 245

point was set out in the case of *Richard Roberts Holdings Ltd. and another v. Douglas Smith Stimson Partnership and Others*⁶⁸.

It was explained that if the only practical method of overcoming the breach of duty caused by the defendant is to build a higher standard, the plaintiff may recover the cost of building to that higher standard, unless the new works are so different as to break the chain of causation.

It has to be borne in mind that such betterment has to be justified in order not to form an unlawful enrichment within the ambit of Section 165.1 (Three) of the Civil transactions Act 1984.

5. Quantification of Damages:

In English law and practice a number of difficulties arise in quantifying a claim for damages or a claim under tort and contract. First the plaintiff must show the basis on which the damages are recoverable; second he or she must prove the precise loss sustained and in doing so he must attribute each item of loss to a breach; third; there are difficulties quantifying some types of damage such as inconvenience.

i) Identifying the basis of quantification:

Michael O'Reilly stated that the decided cases show a range of techniques used by the court to determine the measure of damage, which the plaintiff is entitled to recover⁶⁹. If for example an act committed by the defendant causes damage to a particular structure it may be appropriate to assess the damage on the basis of the amount that the plaintiff's property is less valuable by reason of the defendant's act; or alternatively it may be appropriate to assess the damage on the basis of the cost to the plaintiff to have the work re-executed which the defendant caused to be damaged.

⁶⁸ 46 BLR 50

⁶⁹ O'Reilly, Michael, *Principles of Construction Law*, 1st edition, p.238.

The cases show that English courts do not lay down precise rules for computing damages. They provide simple principles and it is for the plaintiff to show that his method of calculating the damage to which he contends is reasonable. In *Radford v. DeFroberville*⁷⁰ Mr. Justice Oliver said that the starting point for the applicable principle was the statement by Baron Parke in *Robinson v. Harman*⁷¹ that the rule of common law is that when a party sustains a loss he is so far as money can do it to be placed in the same situation with respect to damages to restore him to the situation before the occurrence of the damage.

Mr. Justice Oliver then went on to say that the measure of damage could not be determined in the abstract and that the court does not disregard the hopes and aspirations or the individual predilections of a particular of the particular plaintiff in applying that basic principle.

ii) Remediating defective work:

The question of the appropriate method of computing damages for defective work is of great importance in construction law. Various bases for calculation may be suggested including the diminution of the value of the building and cost of repair.

Often the building experiences a small diminution in value despite the defective work whereas the cost of remedying that work is very costly. On such a case the contractor will attempt to have the damages calculated on a diminution basis while the employer will seek to recover the cost of the remedial work.

In comparison to cases of damages in contract we can see that what Lord Cohen found in *East Ham Borough Council v. Bernard Sunley Ltd*⁷². Lord Cohen referred to bases of assessing damages as follows:

⁷⁰ 7 BLR 35

⁷¹ 1848 1 Exch. 850

⁷² 1966 AC 406

“The learned editors of Hudson’s Building and Engineering Contracts 8th edition 1959 say at page 319 that there are in fact three possible bases for assessing damages namely (a) the cost of reinstatement (b) the difference in cost to the builder of the actual work done and work specified or (c) the diminution in value of value of the work done due to the breach of the contract. They go on saying that there is no doubt whenever it is reasonable for the employer to insist upon reinstatement the court will treat the measure of reinstatement as the measure of damage.”

iii) Proving the loss:

In some situations in construction the precise cause and effect for each individual loss is difficult to establish. The reason for this is obvious for those who are involved in the planning of construction work; the interactions and interrelations between individual items are complex.

This complexity may be shown on a very detailed network representation of the project. But even this does not allow the precise cause and effect relating to each change in the work to be computed

- Necessity as a Defense to tortious liability: The defense of necessity was recognized in Sudanese law in the case of Ahmed Mohammed Ahmed Yahya vs. Sudan Oil Seeds Company⁷³ where it was held that he who causes damage for the purpose of avoiding a greater damage to him or to another person would not be considered in fault but rather under a state of necessity. However raising a defense of necessity according to the mentioned case does not exempt the person causing the damage from compensating the aggrieved party. But assessment of damages would not be made according to the general principles of

⁷³ SLJR 1992 p. 410

quantification of damage. The court would in such cases assess a reasonable and fair compensation.

Damage would be considered to have been caused under a state of necessity according to the following criteria:

- The person causing the damage must have acted under the threat of imminent danger person or property.
- The person causing the damage should not have intentionally caused the mentioned danger.
- The damage being avoided should be greater than the damage actually caused.

6. Conclusion:

Effects of construction works extend to a number of parties and non-parties. Thus it has been shown in this chapter that many torts could arise in the course of construction. The construction contract is not the only source of liabilities in construction.

The parties to construction contracts should carefully consider issues of tortious liability. The negotiation and drafting of a construction contract requires a profound view of all the anticipated events.

For the sake of risk allocation and proper contract management the precaution to be taken by parties to construction contracts are of paramount importance. The parties who are able to form a clear understanding of the nature of the project they are implementing can better contract for its implementation. Their awareness helps them be well prepared for all project eventualities.

It is evident that Sudanese precedents as well as statutory law are general in dealing with issues of tort. There are so many areas in which Sudanese law still needs more clarification with regard to construction.

CHAPTER 3

Joint and Vicarious Liability

1. Introduction:

The main features of construction are the large numbers of parties often involved in one or more pieces of work. There may be an employer, main contractor, several subcontractors each with overlapping responsibilities, numerous consultants each interacting with one another and each being a potential contributor to any damage which follows, employees acting recklessly while they are in their employers business and so on.

It is therefore a matter of practical importance to see how liability is apportioned when damage is caused by more than one person under the control of another.

2. Vicarious liability in Tort:

The most common situation where vicarious liability arises is where an employee commits a tort; here the employer becomes vicariously liable. The rationale for vicarious liability derives from social considerations. A commercial enterprise involves profit and risk. It would not be right to allow the employer to take the profits and transfer his risks onto the public. The law provides the plaintiff with a choice. They may take action against the employee or the employer and usually choose the latter.

The law recognizes a distinction between employees and independent contractors. Independent contractors cannot be controlled by their employer and so no vicarious liability attaches to the employer for acts of independent contractors. Accordingly the distinction between employees (servants) and independent contractor is an important and fundamental one since servants attract vicarious liability for their employees

while independent contractors do not. The precise test to be applied in order to distinguish between independent contractors and employees is not always clear.

Lord Denning said in *Stevenson Jordan & Harrison v. MacDonald Evans*⁷⁴:

“The test usually applied is whether the employer has the right to control the manner of doing the work. A simple test is suggested: If the employer can only control what is done the employee is an independent contractor and his torts do not make the employer liable. If however the employer can control the way in which it is to be done then the employee is a servant and the employer will be vicariously liable for his torts. However the nature of the relationship must depend on all the circumstances and control is only one though an extremely important factor,

An employer does not attract liability to his employer for every negligent act, only those which are referable to the employment relationship subsisting between them. One problem is to determine whether what is done by an employee, albeit, an authorized act is referable to the employment relationship.

For instance in *Whatman v. Pearson*⁷⁵ a contractor allowed his workmen an hour for lunch but they were not permitted to go home or leave their horses and carts unattended. One workman however went slightly out of his way in order to go home for lunch and he left his horse in front of his house. The horse ran off and damaged the plaintiff's property. The question was whether the employer was vicariously liable and this turned on whether or not the workman was acting in a way which was referable to his employment. The court decided that this was properly left to the jury for their decision and that they could justifiably decide that the employer was vicariously liable.

⁷⁴ 1952 1 TLR 101

⁷⁵ 1868 LRCCR 3 p. 422

- Lending an employee:

Some decided English precedents have considered vicarious liability where an employer A lends an employee B to another C. The issue is if B in the course of his employment commits a tort against X is it A or C who is vicariously liable to X⁷⁶.

In *Mersey Docks & Harbours Board v. Coggins and Griffith (Liverpool) Ltd*⁷⁷. A employed B as a driver of a mobile crane and let the crane together with B as driver to C. While operating the crane B negligently injured X. The House of Lords held that A was vicariously liable for the acts of B.

From the perspective of the borrower we find that according to the rule in *Davies v. Collins* the contractor can allow others to perform his obligations while remaining liable himself⁷⁸. However some of the exceptions to this are cases where the contractor does not have the right of performing by another if either there is a prohibition in the contract or there is some personal element in his obligation.

3. Contractors' Liability for injury to third parties:

Wallace is of opinion that contractors and sub-contractors, as the persons actually carrying out building operations, are clearly liable if negligent to persons injured by their operations, or by subsequent failures or accidents in a building after completion caused by their negligence⁷⁹.

The following cases illustrate different relevant situations:

- Damage to Adjacent Building caused by Heavy Vibration:

In *Hoare v. MacAlpine*⁸⁰ contractors drove a large number of piles into the soil while preparing the site for a large building in the heart of the city, and the heavy vibration caused serious damage to an old house

⁷⁶ Weir Casebook on Tort 4th edition p. 216

⁷⁷ 1947 AC p. 136

⁷⁸ *Davis v. Collins* 1945 1 all E.R. 247, 249 (CA)

⁷⁹ I.N. Duncan Wallace, *Hudson's Building and Engineering Contracts* p. 183

⁸⁰ (1923) 1 CH 167

belonging to these plaintiffs, who were compelled to demolish a large part of it under a dangerous structure notice. The contractors contended that the building was exceptionally old and frail, and that this action did not therefore constitute a nuisance since a normal building would not have suffered damage. Held, even if the building was in such an unusually frail state that nuisance could not be established, the defendants were absolutely liable for the damage done by them under the rule in *Rylands v. Fletcher*.

- Fireman Electrocuted while attending Fire:

In *Hartley v. Mayoh & Co. and the N.W. Electricity Board*⁸¹ a fireman attending a fire in the first defendant's factory premises was electrocuted and killed. The cause of his electrocution was:

First, those absolute tumbler switches, which were in fact the main switches, had been left on, although the firemen had switched off all the other switches so that no current should have been in the part of the building affected by the fire. Secondly, two wires had been transposed so that although all the switches except the main switches were off, current was still flowing in that part of the building. The second defendants or their predecessors had done work in the building in 1930, 1946 and 1950, and the transposing of the wires was due to the negligence of some employee of the second defendants on a previous occasion, which it was impossible to identify. The fault was one, which might have been found if a proper test had been carried out after work was done. The second defendants had not pointed out after work was

⁸¹ (1954) 1 Q.B. p 383

done. The second defendants had not pointed out to the first defendants, who were the occupiers of the factory, that the main switches were obsolete. It was negligent of the first defendant's manager not to know where the main switch was.

Held, the first defendants were 10 percent to blame and the second defendants 90 percent, to blame, and both were liable in damages for the death of the fireman.

- Obstruction of Access to Neighboring Buildings:

In *Billings v. Riden*⁸². Contractors working on occupied premises obstructed the access to the premises, so that visitors to the premises had to make a short diversion onto the adjoining premises in order to reach those on which the contractor was working. The adjoining premises were in an unfit and dangerous condition and the plaintiff fell and was injured there while on her way home after visiting the occupiers of the premises. Held, by the House of Lords, that the fact that the contractor was not in contractual relations with the defendant was irrelevant; the duty owed by the contractor was not the same as the duty of the owner (whose duty as a licensor, for instance, might be of limited scope and voided by proving a plaintiff's knowledge of the danger, or warning); and, notwithstanding that the plaintiff was aware of the dangerous condition of the adjoining premises, the contractor was liable for failure to use reasonable care to prevent danger to persons who might be expected lawfully to visit the house. Per Lord Keith, a contractor is not normally liable for a danger not of his own creation on adjacent property, with which he has no right to interfere, but if, as here, he does not provide a reasonably safe approach to a house he may be liable if

⁸² (1958) A.C. 240

a person, attempting to enter or leave the house, is precipitated into the danger on the adjacent property.

- Damage caused by a defect in the Building:

In *Gallagher v. McDowell Ltd*⁸³. Builders negligently plugged a hole in a wooden floor. The defect was not noticed by the owner, who subsequently let the house to the plaintiff's husband. The plaintiff was injured when the heel of her shoe went through the hole. Held, by the Court of the Appeal of Northern Ireland, that the immunity in relation to real property only applied to vendors or landlords property, and that the builders owed a duty in tort to all lawful users of the house they had constructed.

- Injury caused by lack of support to a wall:

In *Clayton v. Woodman & Sons (Builders) Ltd*⁸⁴. an Architect administering a contract was advised by an experienced bricklayer that it would be better to pull down an existing wall which was intended to be used in the works if it was sufficiently strong. The architect satisfied himself that the wall was adequate for its intended function, and decided not to change the original intention. The bricklayer was injured when the work was carried out without support being arranged for the wall. The contractor was required by the specification to provide all necessary shoring and support. Held, by the court of Appeal, that the architect did not in the circumstances owe any duty to the workman. To do more whether by advice or warning would be to step out of his own province into that of the builder. Had he ordered the work to be carried out without support that would have been a different situation, but all he had done, as he was entitled to do, was to refuse to alter the contract.

⁸³ (1961) N.I p. 26

⁸⁴ (1962) 2Q.B. p. 533

- Damage caused by the collapse of a stage:

In *Voli v. Inglewood Shire Council*⁸⁵ the plaintiff attended a meeting at a public hall, and was injured when the stage collapsed. He sued both the architect and the owners of the hall, who had hired it out to the association giving the meeting. The design of the floor joists and stage was defective. Under the architect's contracts of employment all his plans and specifications were subject to the inspection and approval of his employers' public works department. Held, by the High Court of Australia, that (1) the architect was independently liable in tort for failing to design a stage capable of bearing the number of people likely to assemble there; (2) nothing in the contract of employment of the architect could affect his liability to third persons; and (3) the owners were also vicariously liable for the architect's negligence, the immunity of landlords (if there was indeed a letting) not extending to persons letting out property for public purposes.

- Demolition Workers Leaving a wall in Dangerous Condition:

In *Clay v. A.J.Crump Ltd*⁸⁶. prior to entry on the site by main contractors, an architect, after a telephone discussion with the demolition contractors who had cleared the site, approved of their leaving an existing wall standing on the site without support in a dangerous condition. The architect had accepted the opinion of the demolition contractors that it was safe, and though he subsequently visited the site and had an opportunity to do so, did not in fact

⁸⁵ (1963) 110 C.L.R 74

⁸⁶ (1964) 1 Q.B. 533

examine the wall carefully. The building contractors did not do so either, but assumed that the architect had satisfied himself about its safety. A workman of the building contractors was injured when the wall collapsed. Held, by the Court of Appeal, that the architect, the demolition contractors and the building contractors were all liable to the workman.

▪ Workman injured by collapse of Concrete:

In *Florida Hotels Ltd. v. Mayo*⁸⁷ an Architect was employed under RAIA terms of engagement (similar to those of the RIBA), which included “periodical supervision and inspection as may be necessary to ensure the works generally are executed in accordance with the contract: constant supervision does not form part of the duties undertaken...” The building owner in fact employed no main contractor, using his own foreman and leading hands to supervise the work, which included a concrete swimming pool, in conjunction with the architect. The architect visited twice a week, including a Friday at a time when the reinforcement for the concrete aprons of the pool was not yet fixed. After the visit, the mesh reinforcement was placed longitudinally instead of transversely. By the next visit the concrete had been poured. When the form work was struck, the concrete collapsed and injured a workman. The building owner when sued joined the architect as a third party. Held, by the High Court of Australia (Windever J.dissenting), that the architect’s obligation was to inspect form work and reinforcement before pouring and not to assume that the foreman would postpone pouring of concrete till the next inspection. He should have given clear and express instructions to the foreman that concrete should not be poured until the architect had been notified and had inspected:

⁸⁷ (1965) 113 C.L.R p. 588

- Damage caused by a hole in the Roof:

In *McArdle v. Andmac Roofing*⁸⁸ holiday camp proprietors P. had a building and maintenance subsidiary which employed N., “labour-only” contractors, to fix joists and boards on a roof to receive the felt of A.. Specialist roofing contractors. One of the “labour-only” employees left a hole in the roof unguarded before going to lunch, and an employee of the roofers fell from the roof and was injured. He sued P. ‘s subsidiary, his own employers A.. and N. No special arrangements about safety had been made by anyone. Held, by the Court of Appeal, that as P. was employing two small contractors who were to work in proximity and one of whom was “labour-only”. P. had assumed the duty of co-coordinating the work and was under a duty to see that reasonable safety precautions were taken. P., N. and A. were all liable, and as between each other were each one-third liable.

A slightly similar Sudanese case was *Ali El Hag Mansoor V. El Hag Ahmed Abu Zeid And Mohamed Tewfik Hussein*⁸⁹, which recognized the duty of the employer to see that reasonable safety precautions were taken. However, that case was decided on different grounds because the issue in question was whether the plaintiff was entitled to claim damages despite his signature of a settlement of claim of compensation.

The facts were as follows; Plaintiff was employed by defendants as a carpenter to help in the fitting of the roof of a building under construction for the Sudan Army Engineering Corps in Omdurman. On May 26, 1958, whilst working on a part of the

⁸⁸ (1967) W.L.R 356

⁸⁹ HC-CS-214-1959-SLJR 1960

roof that was still under construction, he tried to cross to the other side of the roof; but he stepped onto an asbestos sheet, which collapsed, and he fell to the ground below, and sustained a fracture to his ankle.

On July 30, 1958, Plaintiff wrote and signed a document whereby he agreed to accept £S.32.500m/ms as compensation for his injury in full and final settlement and he later signed a receipt re-affirming the contract. Plaintiff was literate, but did not seek legal advice before entering into the agreement. In 1959 plaintiff brought an action claiming damages on the grounds that his personal injuries were caused by the negligence of the defendants.

Held: The plaintiff was aware of the contents of the document and understood them. Accordingly plaintiff was not entitled to recover any damages from the defendants because he accepted a full and final settlement of his claim.

- Demolishing a Neighboring House:

In *Old school v. Gleeson*⁹⁰ Owners demolishing two houses before developing them became liable under a party wall award for damage done to a third house. Their contractors admitted liability, but sued the owner's consulting engineers, alleging a duty to supervise and negligent design. Held, by Sir William Stabb Q.C., following *Clayton v. Woodman* and distinguishing *Clay v. Crump*, that the claim. Per Judge Stabb, the duty of care in no way extended into the area of how the work was carried out. There was no duty to instruct the builder how to do the work, nor to detect faults during the progress of the work onto the engineer on the ground that he failed to intervene to prevent damage to adjoining property. As to the design, only if a design was so faulty that a

⁹⁰ (1976) B.L.R 100

competent contractor could not have avoided the resulting damage by taking all possible precautions should the engineer in principle be liable.

- Negligence by a tree felling Contractor:

In *Salisbury v. Woodland*⁹¹ the occupier of a house adjoining a highway engaged an apparently competent tree-felling contractor to remove a tree in his front garden. The contractor negligently damaged telephone wires, which fell across the highway, and passer-by was injured by a car running into him. Held, by the Court of Appeal, that since the work was neither of an inherently dangerous nature nor carried out on the highway itself, the case did not come within any of the recognized exceptions to the independent contractor rule, and the occupier was not liable.

- Liability of Bailor or lender of Chattel:

In *Wheeler v. Copas* (1981)⁹² a farmer engaged a firm of bricklayers to do work and undertook to provide equipment, he provided a farm ladder to carry up materials and one of the partners was injured when it collapsed. held, by Chapman J., that while not liable under the Occupiers' Liability Act 1957, since the ladder was no longer under the farmer's control and had been taken over by the contractors, he owed a duty of care either as a bailor or lender of a chattel or as an occupier of property who intended others to come and use appliances supplied by him.

- Superintendence of the Scaffolding:

⁹¹ (1970) 1 Q.B.324

⁹² 3 All E.R. 405

In *Kealey v. Heard*⁹³ a developer/converter of property engaged specialist tradesmen individually and had scaffolding erected by one of them. Some unknown person had placed planks on the scaffolding which collapsed, injuring a self-employed plasterer. Held, by Mann J., since the developer had not engaged anyone to superintend the scaffolding, he was liable in negligence for failure to exercise proper care and control over the building appliances he had supplied.

- **Dangerous Internal Glass Panel:**

In *Rimmer v. Liverpool City Council*⁹⁴, a local authority designed and built premises for letting with an internal glass panel which was dangerous because it was too thin. A tenant who had been injured when falling against it sued in negligence. Held, by the Court of Appeal, that the local authority were not, by reason of limitation, liable under section 1 of the Defective Premises Act 1972, nor under section 4 (1) of that Act, since it was not a case of breach of a repairing obligation.

- **Negligent Plastering by sub-contractor:**

In *D. & F. Estates v. Church Commissioners for England*⁹⁵ a plastering sub contractors on a large luxury development introduced an unspecified coat of browning plaster balanced by a thinner coat of bonding plaster. The main contractors' supervisors must have known of this and that it was a breach of manufacturers' introductions. There were widespread falls of plaster in the development, and a subsequently flat owner sued the main contractors for the cost of repairs. Held, by the Court of Appeal (and affirmed, although obiter, by

⁹³ (1983) 1 All E.R. 973

⁹⁴ (1985) 1 Q.B. p. 1

⁹⁵ (1987) 3 Const. LJ p. 110

he House of Lords, who held there was no liability in any event). The main contractors were not liable for the negligence of the sub contractors.

- Demolished Building Constituting Danger to Neighboring Buildings:

In *Smith v. Littlewoods Ltd*⁹⁶, developers partly demolished a cinema prior to its redevelopment, and left it unattended before commencing construction. Children broke in and were seen to make fires in and near it, but this was not reported to the police or the developers. Eventually children or teenagers deliberately set fire to it and seriously damaged adjoining property, whose owners sued the developers. Held, by the House of Lords, that this was not an obvious fire risk, and since the previous acts of vandalism were not known they were not liable. Per Lord Brandon, the owners general duty was to exercise reasonable care to ensure the building did not become a source of danger to neighboring buildings. Whether that extended to prevent young persons obtaining unlawful access and setting fire to it must depend on whether the behavior was reasonably foreseeable.

Sudanese law has dealt with strict liability of the employer in the case of Butros Yousuf v. Malwal Akom Bom⁹⁷. The facts and the findings in that case are as follows: The defendants (appellants) are proprietors of a tiles factory. The plaintiff (respondent) was engaged in the factory as a manual laborer early February 1974.

⁹⁶ (1987) A.C. 241

⁹⁷ SLJR 1977 p. 34

On the 28th of the same month and in accordance with instructions to that effect the plaintiff took over the duty of operating the tiles production machine, which was electrically propelled. The machine was composed of dangerous parts. On 2.3.1974 while the plaintiff was carrying on his duty the glove he was wearing was caught by a nail protruding from the wheel of the machine thereby pushing the plaintiff's left hand towards the wheel ultimately leading to the amputation of the hand at just above the joint of the wrist. This resulted in a permanent disability medically assessed at 70%.

Held:

- Employer's liability for injuries sustained by a workman in the course of employment in a dangerous machine is strict.
- Employing a workman without instruction or training in a machine some parts of which are dangerous is tantamount to negligence whereby the employer renders himself liable for any injuries thereby suffered by the workman in

pursuance of the general principles of liability in
tort.

The machine referred to in the case was a dangerous one but can only be an example of the different types of machines and tools used in construction activities. But it would not be easy in all cases to provide a fixed definition of what a dangerous machine is, given that the modern construction technology is coming up with more and more mechanization for the swift and effective performance of construction jobs. Although not referred to in the precedent, tools can also be as dangerous as machines if not used properly.

The extent of training and instructions to the worker as a means for avoiding strict liability of the owner was not elaborated upon in the precedent but it added an important exit for the employer for the purpose of avoiding strict liability according to the mentioned precedent.

The rule in the precedent needs to be viewed in line with The Work Injuries Compensation Act 1981. Section 10 (2) of the Act provides that An injured workman shall not be entitled to any compensation under for any work injuries arising out of gross and willful misconduct on the part of such workman, unless such injury leads to death or results in disability not less than 40%.

Gross negligence or contributory negligence were not at issue in the precedent so was the issue of selection to sue in tort or under the Workmen Compensation Ordinance, 1949 which was in force at he time of the precedent.

4. Liability for the acts of Independent contractors:

The general rule in English law is that an employer is not liable for the acts of an independent contractor in the same way as he is for the acts of his servant. In

Honeywell and Stein Ltd. V. Larkin (London Commercial Photographers) Ltd⁹⁸ Lord Justice Slesser said:

“It is well established as a general rule of English law that the employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents even though these acts are done in carrying out work for his benefit under the contract.” However there are a number of important exceptions.

Whenever an employer authorizes the independent contractor to commit a tort the employer cannot avoid liability for it because he has in effect acted in concert with the contractor. Thus in *Ellis v. Sheffield Gas Consumers Co.*⁹⁹ the defendant gas authority had authorized a contractor to make excavations on the street the result of which was a spoil heap. The plaintiff fell over this and was injured. The defendants were liable, as they had authorized the nuisance.

There are a number of situations where the law characterizes the employer’s duty as non-delegable in which case the employment of an independent contractor no matter how reputable or skilled will not enable the employer to avoid his liability. There appears to be no consistent rule about which type of activities might be so characterized. Duties, which have been held, to be non-delegable include the employer’s duty to provide a safe workplace for their employees. There is also a class of such duties classified under the head of hazardous activities. In *Salisbury v. Woodland*¹⁰⁰ Lord Justice Widgery said that an employer was not liable simply because the work was hazardous it has to be attended by some special hazard such as that an employer could not reasonably avoid his liability by employing an independent contractor. Examples which are of relevance to the construction industry and which have been held to be attended by special hazards include working on the

⁹⁸ 1933 ALL ER 77

⁹⁹ 1853 2 E&B 767

¹⁰⁰ 1970 1 QB 324

high way. *Holliday v. National Telephone Co.*¹⁰¹ and grounds works adjacent to a neighboring property, which threaten to undermine its foundations *Angus v. Dalton*¹⁰² or work such as metal welding which may cause fire *Honeywell and Stein Ltd. V. Larkin Brothers (London Commercial Photographers) Ltd*¹⁰³.

Sudanese law adopted this same standing since 1959. In the Sudanese precedent, *Hassan Abu Mirein vs. Mukhtar Nurein*¹⁰⁴ It was held that an employer is liable for the torts of his independent contractor when the injury arises from the doing of the very thing, which he has delegated, to the contractor.

M.A. Abu Rannat CJ stated the following:

“ The facts of this case are quite simple and I shall set them out here:_ The plaintiff was occupying shop No. 46 Bloch 20 in Omdurman Market which is adjoining defendant’s shop . On 20th January 1958 the defendant made an agreement with a independent contractor to pull down and rebuild six shops one of which was adjoining the shop occupied by the plaintiff. While the contractor was digging the foundation of the adjoining shop the partition wall of the shop occupied by the plaintiff fell down and the plaintiff was compelled to remove his goods from the shop. The plaintiff claimed that some of his goods were damaged and claimed the value of the damaged goods and loss of profit during the period he was unable to occupy his shop.

The defendant denied liability on the grounds that he delegated the work to an independent contractor who was fit and qualified for the performance of such work and that proper instructions were given to him to avoid the dangers incidental to the work. The defendant refers to the passage contained in the contract between him and

¹⁰¹ 1889 2 QB 392

¹⁰² 1888 6 App Cas 740

¹⁰³ 1933 All ER 77

¹⁰⁴ SLJR 1959 p.30

the independent contractor which reads: “The contractor shall be fully responsible for any damage that may be caused to the buildings of the neighbours”.

I think it has been settled law that the occupier of property cannot escape liability by the mere employment of another:

- a) When the work he imposes on another is illegal.
- b) When the injury arises from the doing of the very thing which he has delegated.
- c) When the thing to be done arises out of a statutory duty or public authority.
- d) When the thing to be done is necessarily dangerous.

It appears to me that condition b applies to the facts of this case and in support of this view. I refer to a passage in the judgment of Lord Blackburn in *Dalton vs, Angus*¹⁰⁵. He said at page 829: “a person causes something to be done the doing of which casts upon him a duty cannot escape from the responsibility attaching on him on seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed but he cannot thereby relieve himself from liability for those injured by the failure to perform it.”

The leading authority for the liability for an employer who employs an independent contractor who interferes with support accorded to land or buildings is *Bower vs. Peate*¹⁰⁶. In that case the defendant employed a contractor to pull down his house and in the course of the operations damage was caused to the plaintiff’s house owing to the inadequacy of temporary support. Cockburn CJ at page 326 said: -

¹⁰⁵ 1881 6 App. Cas. 740

¹⁰⁶ 1867 1 Q. B. 321

“ The answer to the defendant’s contention may however as it appears to us be placed on a broader ground namely that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour may be expected to arise unless means are adopted by which such consequences may be prevented is bound to see to the doing of that thing which is necessary to prevent the mischief and cannot relieve himself of his responsibility by employing someone else_ whether it be the contractor to do the work from which this danger arises or some independent person to do what is necessary to prevent the act which he has ordered from becoming wrongful.”

In our view the defendant is liable for damage caused to the plaintiff’s property and he cannot escape liability by delegating the work to an independent contractor, we also approve of the principle contained in Hamza Ali Kameir vs. Mohammed Hassan Al Sawahli which is reported on page 74 of the Sudan Law Journal and Reports 1956."

5. Vicarious Liability and Independent Contracts:

In tort a defendant without personal negligence will be vicariously liable for the negligent acts or omissions of his servants while acting within the scope of their employment, the general rule is that he will not be vicariously liable in this way for those of an independent contractor agent while the latter is performing his contract.

There are, however, a number of cases where this is not so, and where the employer of the independent contractor will nevertheless be liable in tort.

The following cases provided in Hudson's Building and Engineering Contracts page 235 illustrate a few example of the issue:

- Independent Contractor Building on Inadequate Foundation:

In *Mount Albert Borough v. Johnson*¹⁰⁷ a developer who was also a builder acquired land and sub-divided it into plots and then built upon it, engaging a partnership, which he did not himself join, as his builders. There was a close relationship at all times between him and the partners. A house was built on inadequate foundations, which were in breach of the by-law, and the owner sued the developer, the builders and the local authority for the cost of repairs under the *Anns* principal. Held, by the Court of Appeal of New Zealand, that there was a duty of care to avoid economic loss owed to subsequent occupiers under the *Anns* principal, and the developer could be treated as jointly liable in negligence with the building partnership, but additionally the duty of care owed by him was in any event non-delegable to an independent contractor such as the building partnership.

- Independent Contractor Departing from Manufacturer's Specification:

In *D. & F. Estates v. Church Commissioners*¹⁰⁸ main contractors for a large luxury flat development engaged a small firm of self-employed plasterers. The plasters deliberately departed from manufacturers' instructions by inserting an additional coat of browning plaster, and some years later plaster fell and large areas of dangerous hollow plaster were also found. The flat owners sued the main contractor for the cost of repairs under the *Anns* principle. There was a finding that the main contractors' supervisors ought to have known that there had been a departure from the specification. The plasters were not worth suing,

¹⁰⁷ (1979) 2 N.Z.L.R 234 at p. 240

¹⁰⁸ (1989) A.C. 177 at p. 208

and the flat owners sued the main contractor. Held, by the House of Lords, affirming the Court of Appeal and not following the Mount Albert case, that in the absence of knowledge of the specification departure, the main contractors were not liable.

- Negligent Interference with Joint roof:

In *Alcock v. Wraith*¹⁰⁹ the plaintiff and the defendants lived in adjoining terraced houses. The defendants engaged a contractor to re-roof their houses, where their new tiles would overlap with the plaintiff's roof. Later damp appeared in the plaintiff's house due to some of the slates on his roof being removed and the joint between his slates and the new tiles being inadequately made. After the contractor had become bankrupt the plaintiff sued the defendants for the cost of remedial work. Held, by the Court of Appeal, that although the defendants had the right to interfere with the joint between the two roofs and to intrude slightly on their neighbor's roof, they must exercise reasonable skill and care in so doing, and this duty could not be delegated to an independent contractor, since the work involved a risk of damage to that property.

6. Joint Liability of Contractor and Engineer:

Sudanese law deals with joint liability in section 151 of the Civil Transactions Act 1984. According to section 151 when two or more persons have committed a harmful act, they shall all be jointly liable for the payment of compensation for the harm. Joint tort-feasors shall be equally liable unless the Court fixes the respective share of each of them in the compensation.

¹⁰⁹ (1991) 59 B.L.R 16

Sudanese Law holds the contractor and the engineer jointly liable for any damage to the property when in case the engineer designs the works and supervises its execution by the contractor. Section 385 of the Act reads as follows:

“If the contract provides for the acceptance by the employer of a building design by an engineer to be executed by a contractor under the supervision of the engineer, the engineer and the contractor shall be jointly liable to compensate the client for any total or partial destruction in any buildings they execute or structure they erect or any defect endangering the safety and integrity of the building, such liability to remain for 10 (ten) years, unless the agreement provides for a longer period.

(1) The said liability for compensation shall remain notwithstanding that the defect or destruction arises as a result of a defect in the soil itself or the acceptance by the client of executing the defective structures.

(2) The period of ten years provided for in sub-section (1) shall commence for the date of the acceptance.”

Other examples of statutory duties relating to construction in the Civil Transactions Act 1984 can be seen in section 595 and 596 which deal with dangerous drainage and roofs. According to the section 595 drainages shall not be constructed to flow water in the land of another without his permission.

The section reads as follows:

- (1) Dangerous drainage shall not be made on the land of others or on a public or private road and the injury shall be abated even if it was ancient.
- (2) The owners of new constructions shall not discharge their drainage water on the land of another without his permission.

Construction of roofs is also dealt with by section 596 in the following context:

- “ (1) The owner of an immovable property shall construct his roof in a manner which causes rain water to drain into his own land or into the public road subject to laws, regulations and custom.
- (2) He shall not discharge such water into the land of others.”

Unlike English law the position of the Civil Transactions Act 1984 seems to be either not explicit or does not recognize at all the distinction between joint and several tortfeasors.

English common law distinguishes between joint tortfeasors and several tortfeasors. In English Law persons are said to be joint tortfeasors when their separate shares are in the commission of the tort are done in furtherance of a common design. The

defendants were found to be joint tortfeasors in *Brooke v. Bool*¹¹⁰, where two men searching for a gas leak each applied a naked light to a gas pipe in turn and one of them caused an explosion. They were held to be joint tortfeasors.

But when two ships collided because of the independent acts of negligence of each of them and one of them without further negligence collided with a third it was held that they were several tortfeasors whose acts combined to produce a single harm because there was no community of design.

8. Conclusion:

In this Chapter the importance of vicarious liability in construction has been discussed and illustrated. Special stress was laid on the fact that all the acts committed during the course of construction are usually acts of employees or contractors.

The distinction between liability for acts by employees and independent contractors was drawn bearing in mind that there are conditions, which must be seen before we can decide that an independent contractor is really independent.

The rules which govern joint liability were discussed showing the position in Sudanese law with examples laid down in the Civil Transactions Act 1984. It has been found there, still, is a great need for more elaboration in Sudanese law regarding the subject matter of this chapter.

¹¹⁰ 1928 2 K.B p. 578

Chapter 4

Findings and Recommendations

It has been found that there is no classification or definition of a construction contract in the Sudanese to provide for application of special rules to such contracts. The only related provision in this respect can be found in The Civil Transaction Act 1984 Part XII, which deals to a limited and insufficient extent with Contracts of Works and Civil Engineering Contracts in section 378. Nevertheless the section does not lay clear rules to govern the special nature of construction contracts.

Sudanese courts have thus far applied the general rules of negligence to some recent cases of construction but no elaboration has ever been made on the sophisticated requirements of liability for negligence in construction.

Although it is well understood that the nature of Sudanese society up to very recent times might not have allowed for the emergence of similar complaints as those we could see in English precedents but nevertheless no particular legal literature has been made available to clarify the rules governing nuisance in the Sudan.

Reported cases as well as legislation related to trespass in Sudanese law do not adequately cover all aspects of construction due to the fact that most trespass cases in the Sudan arose in relation to possession of land and not to construction works.

No specific precedents or rules are available with regard to the tort of interference in the Sudan. Cases which would have otherwise been handled under the tort of interference had presumably been inadequately dealt with under other branches of criminal and civil laws.

The extent to which breach of statutory duty could constitute a tort under Sudanese law has not been given enough judicial and statutory clarification. It has even been found that the position under the Civil transactions Act 1984 section 162 does not provide sufficient basis for handling potential cases under this tort.

It has been found that the liability for dangerous structures is not clear under Sudanese law. Even in the cases which could have given rise to such liability little was said in this regard.

The position in the Sudanese Civil Transactions Act 1984 does not address the issue of foresee-ability of damage the way it has been addressed in English law.

According to the present position of Sudanese law it is not clear whether or not betterment in remedial works fall under the ambit of Section 165 (1) of the Civil Transactions Act 1984 for unlawful enrichment

There is no distinction between joint and several tort-feasors in the Civil Transaction Act 1984. The reported cases do not include or illustrate such a distinction.

Based on the aforementioned findings recommendations will be dawn for reform of Sudanese law in the area of construction. At the inception it is recommended that a definition of a construction contract be introduced in order to provide for its special nature specially in regarding tortious liability.

Due to the great bulk of negligence issues in construction cases it is recommended that the legislator, the courts as well as academic writers are called upon to address the sophisticated requirements of liability for negligence in construction.

It is conceivable that with the rapid development of Sudanese society and economy courts and legislators should recognize the need to elaborate upon the rules governing nuisance. The examples in English law as well as the approach adopted by other cases need not necessarily be followed. No doubt great attention should be paid to the uniqueness and the reality of the Sudanese society in this respect.

Due to the fact that most trespass cases in the Sudan arise in relation to possession of land and not in construction there should be much care in applying those rules to construction works. Special reference is made to section 609 of the Civil Transactions Act 1984 which empowers Sudanese courts to consider transferring the ownership of the occupied portion to the trespasser on payment of just consideration. The crucial issue is that when the assessment of trespass is being made according to the mentioned section the value of the structures on it should be carefully considered.

It is recommended that the position of the Sudanese law be clarified with regard to the tort of interference in the Sudan. Due to rarity of such cases in the Sudan relevant examples in English law can be used for guidance.

Judicial and statutory clarifications are required to show the extent to which breach of statutory duty could constitute a tort under Sudanese law. It is further recommended that section 162 of the Civil Transactions Act 1984 should be amended in order to provide sufficient basis for handling potential cases under this tort.

It is highly recommended that the liability for dangerous structures be defined and clarified by more legislative, judicial and academic input. The rules adopted by English law could provide good guidance and foundation for such attempt.

It is recommended that the Civil Transactions Act 1984 should be amended in order to address the issue of foresee-ability of damage the way it has been. Foreseeability forms an essential part of the general rules governing damage which have a great impact on construction. Better explanation of the quantification of damages, should also be made.

Section 165 (1) of the Civil Transactions Act 1984 should be amended in order to provide exceptions for cases under which betterment in remedial works could be acceptable and be excepted from the meaning of unlawful enrichment under the section.

It is important to create a distinction between joint and several tort-feasors in Sudanese law. The existence of this distinction is an important factor in defining specific liabilities in construction cases.

The architect's liability regarding supervision of work should be defined farther than the extent of section 387 of the Civil transactions Act 1984. The trend in the English and other cases can be very useful if adopted to qualify the reform and application of the mentioned article.

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